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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 390

BROAD RIVER POWER COMPANY, APPELLANT,

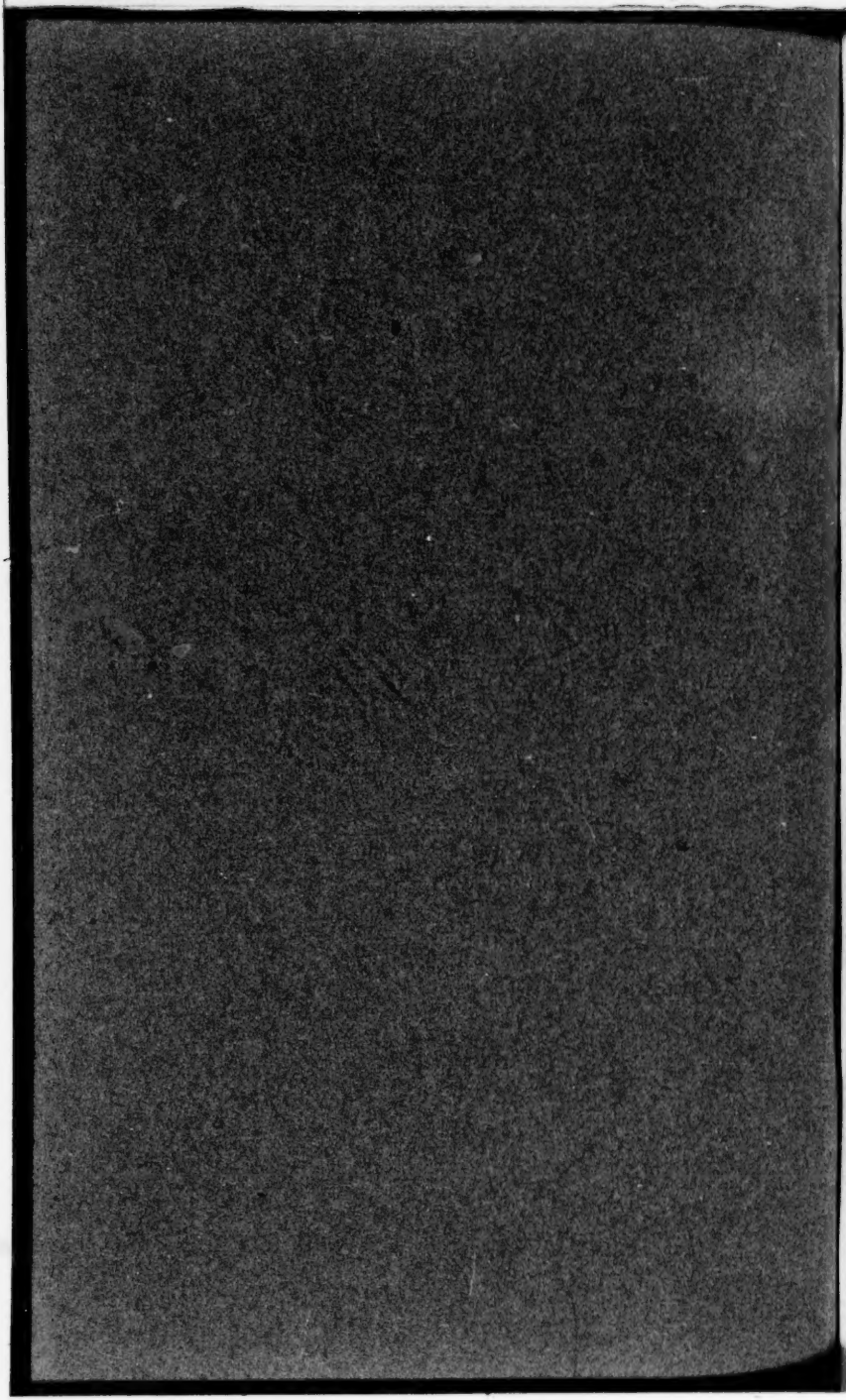
vs.

WALTER G. QUERY, J. P. DERHAM, AND FRANK C. ROBINSON, AS MEMBERS OF AND CONSTITUTING THE SOUTH CAROLINA TAX COMMISSION

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

FILED SEPTEMBER 22, 1932

(37,087)



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[fols. a & 1] [Caption omitted]

[fol. 2]

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

In Equity

BROAD RIVER POWER COMPANY, Plaintiff,

v.

WALTER G. QUERY, J. P. DERHAM, and FRANK C. ROBINSON, as Members of and Constituting the South Carolina Tax Commission, Defendants

BILL OF COMPLAINT—Filed June 6, 1931

To the Judge of the District Court of the United States for the Eastern District of South Carolina:

The plaintiff, Broad River Power Company, presents this its Bill of Complaint against the defendants, Walter G. [fol. 3] Query, J. P. Derham and Frank C. Robinson, as members of and constituting the South Carolina Tax Commission, and for a cause of action says:

First. That the plaintiff Broad River Power Company is a public service corporation duly organized and existing under and by virtue of the laws of the State of South Carolina, and having its principal office and place of business in said State, and is a citizen and resident of said State.

That said Broad River Power Company was duly chartered under the general laws of South Carolina, to engage in the business of serving the public with electric energy for light, heat and power. That for the past six years or more said Broad River Power Company has been generating electricity by hydro and steam power and selling the same, and in all respects performing its corporate and public functions.

Second. That the defendant Walter G. Query is a citizen of the State of South Carolina and a resident of the County of Spartanburg in the Western District of South Carolina;

the defendant J. P. Derham is a citizen of the State of South Carolina and a resident of the County of Horry in the Eastern District of South Carolina; that the defendant Frank C. Robinson is a citizen of the State of South Carolina and a resident of the County of Richland in the Eastern District of South Carolina; that the said defendants Walter G. Query, J. P. Derham and Frank C. Robinson are all members of and constitute the South Carolina Tax Commission which is an administrative body created and existing under and by virtue of the Constitution and laws of the State of South Carolina with offices in the City of Columbia, in the Eastern District of South Carolina.

[fol. 4] Third. That this suit involves questions arising under the constitution and laws of the United States and of the State of South Carolina hereinafter specifically set forth, and that the amount involved exclusive of interest and costs exceeds the sum of $3,000.

That this suit is of a civil nature and attacks the validity of a certain Act of the General Assembly of the State of South Carolina aproved 9th May, 1931, entitled "An Act to raise revenue for the support of the State Government by the impostion of an excise tax upon electric power generated and sold within this State," hereinafter more particularly referred to and a copy of which is hereto attached, marked Exhibit "A" and made a part hereof, which said Act purports to impose upon this plaintiff, in addition to all other taxes of every kind now imposed by law, an excise, license, or privilege tax of five-tenths of one mill upon each kilowatt hour of electric power manufactured or generated and sold, said tax to be paid to and collected by the South Carolina Tax Commission, which Commission is given power under the terms of said Act to enter upon the premises of this plaintiff, and to examine its instruments, books, records, etc., and to make rules and regulations pertinent to the enforcement of said Act, which shall have the full force and effect of law.

That under the terms of said Act it took effect on May 1st, 1931, and subjects this plaintiff to the payment of said tax between the 1st and 10th of June, 1931, and each month thereafter; that failure to pay said tax when due each month will subject this plaintiff according to the terms of said Act, to a penalty of twenty-five per cent of the amount of tax found to be due, and that all taxes and penalties shall

[fol. 5] be construed to be a debt payable to the State and constitute a first lien upon all the property of this plaintiff.

That said Act further provides that if the tax imposed by the Act is paid under protest, that this plaintiff may at any time within thirty days after making such payment under protest, but not afterwards, bring an action against the South Carolina Tax Commission in any court of competent jurisdiction for the recovery back of such tax so paid under protest, with interest at the rate of four per cent., whereas plaintiff, in order to carry on its public business, is required to borrow funds from time to time and to pay interest thereon at a rate in excess of six per cent.

Fourth. That the South Carolina Tax Commission has already undertaken initial steps for the carrying into effect of said Act and unless enjoined and restrained threatens to collect a tax under said Act on all electricity generated by this plaintiff.

Fifth. That the further object of this suit is that plaintiff may be relieved from the payment of the taxes imposed by said Act approved 9th May, 1931, and that the same may be declared to be illegal, null and void, in that it unlawfully infringes plaintiff's constitutional rights, and if enforced will deny to the plaintiff the equal protection of the law, and will amount to the unlawful taking of plaintiff's property without compensation, and without due process of law, and will in fact amount, in connection with other taxes payable to the State of South Carolina, to confiscation of plaintiff's property without compensation, and without due process of law; in violation of the Constitution of the United States and of the State of South Carolina as hereinafter set forth.

[fol. 6] Sixth. This plaintiff avers that its hydro electric and steam generating stations produced during the year 1930 one hundred sixty-nine million thirty-eight thousand nine hundred ten kilowatt hours of electric energy, and the tax imposed by the Act in question will amount to approximately $85,000 per annum, or more, and plaintiff avers that said Act is illegal, null and void, and should be so declared upon the ground that it violates Sections 5 and 6 of Article I of the Constitution of South Carolina, and Section 1 of Article X of the Constitution of South Carolina, and Sec-

tion 10 of Article I of the Constitution of the United States, and also the Fourteenth Amendment to the Constitution of the United States, in that the said Tax so imposed by the said Act in its practical operation and effect will deny to this plaintiff the equal protection of the laws, will take its property without due process of law, for the reason that inter alia the said tax is discriminatory; impairs the obligation of plaintiff's contract with the State of South Carolina; is not graduated in accordance with the provisions of the Constitution of the State of South Carolina, and is confiscatory of plaintiff's property.

Seventh. Plaintiff alleges further that on or about May 1st, 1931, pursuant to Act of the General Assembly of South Carolina, a license or privilege tax amounting to three mills on its entire gross receipts for the year 1930 was paid the State of South Carolina by plaintiff, which, under the existing provisions of law, entitled it to the right to carry on its business in the State of South Carolina for the year 1931, and that further this plaintiff has already incurred under another Act of South Carolina, an obligation to pay to the State of South Carolina an additional license, excise or [fol. 7] privilege tax amounting to approximately seven mills upon the assessed value of its real and personal property as fixed by the South Carolina Tax Commission, and that the imposition of the additional license or privilege tax provided for in the Act in question will amount to an impairment of this plaintiff's contract with the State of South Carolina in violation of Section 10 of Article I of the Constitution of the United States, and Section 8 of Article I of the Constitution of South Carolina.

Eighth. That there are engaged in the business of distributing and selling electricity within the State of South Carolina a number of public service corporations which purchase a large amount of the electricity, distributed and sold by them, from other companies which generate said electricity, and that under the provisions of the statute hereinbefore referred to, said public service corporations are exempt from the payment of any tax on the electricity purchased and resold by them.

That electric energy generated by oil or combustion engines is of the same character as electricity generated by hydro-electric or steam generating plants, and that there

are in operation in the State of South Carolina plants which generate electricity by oil or combustion engines, and that no tax is levied on electricity so generated by the terms and provisions of the statute hereinbefore referred to.

That the discrimination hereinbefore in this paragraph alleged denies to this plaintiff the equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution and Section 5, Article I of the Constitution of South Carolina.

Ninth. Plaintiff further avers that the tax imposed by said Act is not graduated in accordance with the provisions [fol. 8] of Section 1 of Article X of the Constitution of South Carolina, in that the said tax is imposed without regard to the amount of business done, or to the value of the kilowatt hour generated by the several public utilities affected by the terms and provisions of said Act.

Tenth. Plaintiff further avers that the tax in question is a license tax for the privilege of doing business, and is not permitted by the Constitution of the State of South Carolina, which provides that the legislature may impose "a graduated license on occupations and business," for the reason that the proposed tax in question is the third different license tax imposed upon electric power companies under existing statutes of the State of South Carolina.

Eleventh. That the plaintiff, as a public utility corporation, is now required to pay a tax of three mills on every dollar of gross revenue received by it, a tax of three mills on the true value of its property which amounts to seven and one-half mills on the value of its property by reason of the ratio at which other property within the State is assessed for taxation. That in addition thereto the plaintiff is required to pay an income tax to the State of South Carolina, in a larger amount than is paid by other corporations not engaged in operating a public utility, and that the plaintiff pays a tax for the support of the Railroad Commission of South Carolina, municipal license taxes in every community which it serves, gasoline taxes on all gasoline consumed in its operations, automobile license taxes on all its motor vehicles and ad valorem taxes on its property to the State, Counties, Municipalities and special school districts in which its operates. That the tax purported to be

imposed by the statute hereinbefore referred to is oppres-
[fol. 9] sive and unlawfully discriminates against the plaintiff and results in the taking of its property without compensation and without due process of law and denying the plaintiff equal protection of the laws, in violation of the provisions of the Fourteenth Amendment to the United States Constitution, and Section 5 of Article I of the Constitution of South Carolina.

Twelfth. That the plaintiff, in the operation of its electric business, generates a large amount of electric energy which is used by it on its own premises for lighting same, power purposes, and for the use of its employees who reside on premises owned by the plaintiff, and that in addition thereto plaintiff is engaged in the operation of a street railway system in the City of Columbia, South Carolina (which is and can be operated only at a loss, excluding from consideration any compensation for electricity generated), in which operation it consumes a large amount of electric energy generated by the plaintiff. That the plaintiff also uses a large amount of electricity generated by it for the purpose of maintaining voltages on transmission and distribution lines, which electricity so used by the plaintiff is used for its own purposes. That by the terms of the statute hereinbefore referred to the plaintiff is required to pay a tax on the electricity so generated by it and used for its own purposes, and supplied to its employees on its own premises, whereas other industrial plants manufacturing or generating electricity for their own use or for use upon their own premises by their operatives or employees are not required to pay a tax thereon.

That by reason of such discrimination the plaintiff is denied the equal protection of the laws guaranteed by the Constitutional provisions hereinbefore referred to.

[fol. 10] Thirteenth. Said Tax Act violates the 14th Amendment to the Constitution of the United States and Section 5 of Article I of the South Carolina Constitution in that it denies to this plaintiff, engaged in the business of generating or producing electricity and electrical energy in the State of South Carolina, the equal protection of the laws and renders it and its property liable to be taken without due process of law, all in violation of the 14th

Amendment to the Constitution of the United States in that the penalties fixed for the failure to comply with any of the provisions of the Tax Act, including the making of such reports as are required by the Tax Act, and the payment of the tax imposed and levied thereunder, and for failure to open for inspection the books and records of the company, as is provided by Section 8 of the Tax Act, are so excessive as to intimidate, coerce and compel any persons coming under the Tax Act, including this plaintiff, to comply with the provisions of said Tax Act without the freedom of resorting to the court to test the validity of the provisions of said Tax Act.

Fourteenth. Plaintiff further avers that the fines and penalties attendant upon a failure to pay the tax imposed by the Act in question, and the institution of a multiplicity of suits, to-wit: one every thirty days in order to comply with the provisions of the Act relating to payment of the tax under protest, effectually operate to deprive, and actually will deprive plaintiff of its property without due process of law in violation of the Constitution of South Carolina, and the Fourteenth Amendment to the Constitution of the United States.

Fifteenth. Plaintiff specifically charges and avers that the statute in question is illegal, null and void and should be set aside, annulled and temporarily and permanently enjoined upon, inter alia, the following grounds:

[fol. 11] (1) That such statute unlawfully invades plaintiff's constitutional rights, protected by the Constitution of the United States, and particularly by Section 10, Article I and the Fourteenth Amendment to the Constitution of the United States, and plaintiff sets up and claims the protection of its rights so guaranteed by the constitutional provisions aforesaid.

(2) That the enforcement of said statute would constitute a taking of plaintiff's property without due process of law, deny to plaintiff the equal protection of the law, take the plaintiff's property without compensation, and impair the operation of its contract with the State of South Carolina, in violation of and in conflict with Section 10 of Article I of the Constitution of the United States and the Fourteenth Amendment to the Constitution of the

United States, and also in violation of Sections 5 and 8 of Article I of the South Carolina Constitution.

(3) That such statute is violative of Section 1 of Article X of the South Carolina Constitution.

Wherefore plaintiff alleges that there is no adequate redress or remedy at law available to it to protect its property and property rights from the imposition of said tax and the fines and penalties for a non-payment thereof, and that it is, therefore, necessary for plaintiff to come into a court of equity and invoke the extraordinary remedies of such courts to avoid a multiplicity of suits, excessive and vexatious litigation, and to prevent irreparable injury, loss and damage to plaintiff's property and rights, and the taking thereof in contravention of the Constitutions of the State of South Carolina and the United States.

Wherefore, the premises being considered, and being without adequate remedy at law plaintiff prays this [fol. 12] Honorable Court to grant plaintiff a writ of subpœna directed to the above named defendants, and each and every of them, commanding them to appear in this Court and to answer (but not under oath, answer under oath being expressly waived), the averments of this complaint and for the following general and specific relief:

(1) That said Act of the General Assembly of South Carolina approved 9th May, 1931, be declared to be invalid and in violation of the Constitutional rights of this plaintiff, and null and void, for the reasons hereinbefore set out.

(2) That in view of the immediate and irreparable loss and damage which will be sustained by this plaintiff by the payment of the tax imposed by the said Act, and the multiplicity of suits necessary to protect its rights, plaintiff prays that the above named defendants, and each of them, be severally and jointly perpetually enjoined from enforcing, or from taking any steps to enforce, or giving any effect to said Act of May 9th, 1931, and from attempting directly or indirectly to compel this plaintiff to comply with the terms and provisions of said Act, and from commencing any suit or proceeding against this plaintiff, or establishing any lien upon its property, or taking steps to enforce or collect any penalties, fines or forfeitures provided or imposed under the said Act in question, or any

other law of the State of South Carolina, by reason of the omission or refusal of this plaintiff to comply with the terms of said Act of 9th May, 1931.

(3) Plaintiff further prays that upon a hearing for a preliminary injunction being had, a preliminary order of injunction of like character issue, and that such injunction pendente lite be granted against each and all of said defendants, enjoining and restraining them until final de-
[fol. 13] cree in all of the respects as to which a perpetual injunction is sought in the foregoing prayer; and that upon final hearing in this cause, this Honorable Court perpetually enjoin the collection of the taxes imposed by said Act of 9th May, 1931, and any effort or attempt upon the part of any or all of the defendants to enforce the same, and to make permanent by injunction the relief hereinbefore prayed, and that this Court declare the said Act to be illegal, null and void, upon the grounds hereinbefore set forth.

(4) That, in any event, an injunction be granted, as hereinbefore prayed, restraining and enjoining the collection of any and all taxes imposed by said Act in question, or any attempt on the part of any of said defendants to enforce a compliance with said Act, or to impose any fines or penalties for the violation or disregard thereof, pending the final decision and order of this Honorable Court in this cause.

(5) Plaintiff further shows that it will suffer irreparable loss, damage and injury, and an illegal taking of its property, unless a temporary restraining order is issued by this Honorable Court on or before June 10th, 1931.

Wherefore plaintiff prays that each and all of said defendants be restrained from collecting said tax, or from enforcing, or taking any steps to enforce the terms and provisions of said Act, until the further order of this Honorable Court.

(6) And plaintiff further prays for all such other and further relief, both general and specific, as the exigencies of the case may require, or to which in equity it may be entitled.

W. C. McLain, Geo. M. LePine, Solicitors for Plaintiff.

[fol. 14] EXHIBIT "A" TO BILL OF COMPLAINT

An Act to Raise Revenue for the Support of the State Government by the Imposition of an Excise Tax Upon Electric Power Generated and Sold Within this State.

Section 1. Be it enacted by the General Assembly of the State of South Carolina:

(a) That in addition to all other taxes of every kind now imposed by law, every person, firm or corporation engaged in the business of manufacturing or generating hydro-electric power in the State of South Carolina shall be subject to the payment of an excise, license or privilege tax of five-tenths of one mill upon each kilowatt hour of hydro-electric power manufactured or generated, and said tax shall be paid to and collected by South Carolina Tax Commission.

(b) That in addition to all other taxes of every kind now imposed by law, every person, firm or corporation engaged in the business of manufacturing or generating electric power by the use of steam power in the State of South Carolina shall be subject to the payment of an excise, license, or privilege tax of five-tenths of one mill upon each kilowatt hour of electric power so manufactured or generated and said tax shall be paid to and collected by South Carolina Tax Commission.

(c) That in addition to all other taxes of every kind now imposed by law, every person, firm or corporation engaged in the business of selling electric power within the State of South Carolina shall be subject to the payment of an excise, license, or privilege tax of five-tenths of one mill upon each kilowatt hour of electric power sold in the State of South Carolina and said tax shall be paid to and collected [fol. 15] by South Carolina Tax Commission: Provided, That if such seller procures electric power which has been subject to the payment of the excise, license or privilege tax hereinbefore provided a credit on said tax to the amount of the excise tax already required to be paid by the person, firm or corporation generating the same within this State shall be allowed: Provided, Further, That the provisions of this Act shall not apply to the electric power manufactured or generated in another State and brought into this

State until such power has lost its interstate character and immunities: Provided, Further, That the provisions of this Act shall not apply to any person, firm or corporation owning and operating an electric manufacturing or generating plant of ten horsepower or less, nor shall the provisions of this Act apply to industrial plants manufacturing or generating power for its own use, or for use upon its own premises by its bona fide operatives or employees but the tax shall be paid upon so much thereof as may be sold to other than its employees: Provided, Further, That the provisions of this Act shall not apply to municipalities manufacturing or generating electricity for the use of its customers.

Section 2. Every person, firm or corporation engaged in the business of manufacturing, generating or selling electric power in this State shall provide themselves with and keep the necessary instruments to show the amount of electric power manufactured, generated or sold, expressed in kilowatt hours, and shall keep permanent, legible records showing the amount of power, expressed in kilowatt hours, manufactured, generated or sold each day. Such records and instruments shall be subject to examination by the Tax Commission or its duly authorized representatives at any time during business hours.

[fol. 16] The South Carolina Tax Commission shall administer and enforce the tax imposed by this Act. It shall have the power to enter upon the premises of any tax payer and to examine, or cause to be examined, any of the instruments, books, records, etc., and to secure any other information directly or indirectly concerned in the enforcement of this Act. Also, make rules and regulations pertinent to the enforcement of this Act, which shall have the full force and effect of law.

Any person, firm or corporation required to keep either the necessary instruments or records prescribed in this Section shall be subject to a penalty One Hundred ($100.00) Dollars per day for each day's omission to keep either the required instruments or required records. Such penalties to be collected in the same manner as herein provided for the collection of delinquent taxes: Provided, upon reasonable cause shown, the South Carolina Tax Commission may remit or refund the said penalties in whole or in part.

Section 3. Every person, firm or corporation subject to the provisions of this Act shall between the first and tenth of each month, make a true and correct return to the South Carolina Tax Commission in such form as it may prescribe, showing the exact amount of electric power manufactured, generated or sold, expressed in kilowatt hours, during the previous month and remit the tax therewith.

In case of failure to make a true and correct return, the Tax Commission shall make the same upon such information as it may be able to obtain, assess the tax due thereon, and add a penalty of twenty-five per cent, and in case of failure to pay the tax, the South Carolina Tax Commission shall add a penalty of twenty-five per cent, whereupon the [fol. 17] South Carolina Tax Commission shall mail notice of the amount of taxes and penalty to the party failing to make such return or pay the tax, and if the tax and penalty is not paid within ten (10) days after mailing such notice, execution shall be issued in the manner and with the force provided hereafter in this Section. If any taxes or penalties imposed by this Act remain due and unpaid for a period of ten (10) days, the Tax Commission shall issue a warrant of execution directed to the Sheriff of any County of the State, commanding him to levy upon and sell the real and personal property of the tax payer found within his county, for the payment of the amount thereof with penalties and the costs of executing the warrant, and to return such warrant to the Tax Commission and to pay it the money collected by virtue thereof.

The Sheriff to whom such execution is directed shall proceed to enforce same in the same manner provided by law for the enforcement of an execution issued by a County Treasurer against a delinquent tax payer. That the taxes and all penalties herein provided for, shall be held as a debt payable to the State by the party against whom the same shall be charged, and all such taxes, penalties and assessments shall be first lien in all cases whatsoever upon all property of the party charged therewith.

Section 4. That if any clause, sentence, paragraph or part of this Act shall, for any reason, be adjudged by any Court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder of this Act, but shall be confined in its operation to the

clause, sentence, paragraph or part thereof directly involved in the controversy in which such judgment shall [fol. 18] have been rendered. No caption of any Section or set of Sections shall in any way affect the interpretation of this Act or any part thereof: Provided, That the collection of the taxes or penalties imposed under the provisions of this Act shall not be stayed or prevented by any injunction, writ or order issued by any Court or Judge thereon. In all cases in which any taxes or penalties are required to be paid hereunder by any person, firm or corporation and the Tax Commission shall claim the payment of the taxes or penalties so assessed, or shall take any step or proceedings to collect the same, the person, firm or corporation against whom such taxes or penalties are charged, or against whom such step or proceedings shall be taken, shall, if he conceives the same to be unjust or illegal for any reason, pay the said taxes or penalties notwithstanding, under written protest, in such funds and monies as the South Carolina Tax Commission shall be authorized to receive, and upon such payment being made South Carolina Tax Commission shall make proper note that the same was paid under written protest and notify the State Treasurer that such taxes or penalties were paid under protest; that the person, firm or corporation so paying said taxes or penalties may at any time within thirty (30) days after making such payment, but not afterwards, bring an action against the South Carolina Tax Commission for the recovery thereof in any Court of competent jurisdiction and/or in proper cases in the Federal Courts and if it be determined in said action that such taxes or penalties were wrongfully and illegally collected for any reason going to the merits, then the Court before which the case is tried shall certify of record that the same were wrongfully collected and ordered to be returned with interest thereon at the rate of four (4%) per centum per annum. Whereupon [fol. 19] the Tax Commission shall issue its warrant upon the State Treasurer for refunding the taxes and penalties so paid, which shall be paid in preference to other claims against the treasury.

Section 5. That the South Carolina Tax Commission may, in its discretion, compromise any action arising under the provisions of this Act, either before or after prosecu-

tion commenced. The South Carolina Tax Commission may, upon good cause shown, remit any penalties accruing under this Act, in whole or in part.

Section 6. For the year 1931 the revenue produced under this Act shall reduce the 1931 property levy for State purposes to the full amount raised under the terms of this Act: Provided, Further, That for the year 1932 and thereafter, the revenue derived under the provisions of this Act shall be turned into the State Treasury for the support of the State Government.

Section 7. Any foreign corporation required to pay a tax hereunder for the year 1931, which shall not, for any cause whatsoever, have paid such license fee or tax, in addition to the payment of all license fees and taxes now or hereafter required by law, shall as an additional license fee or tax, for the year 1932, pay an amount equal to the license fee or tax provided for in this Act for the year 1931, and the payment of such additional license fee or tax for the year 1932 shall be a condition and part of the terms upon which they are allowed to enter this State and do business herein for the year 1932.

Section 8. The tax provided in this Act shall be calculated and paid on all electric power manufactured, generated or sold, on and after the first day of May, 1931.

Section 9. That this Act shall take effect immediately upon its approval by the Governor.

Approved the ninth day of May, 1931.

[fol. 20] *Duly sworn to by J. F. McKenna. Jurat omitted in printing.*

[fol. 21] IN UNITED STATES DISTRICT COURT

APPLICATION FOR TEMPORARY RESTRAINING ORDER AND FOR INTERLOCUTORY INJUNCTION

Now comes the above named plaintiff and shows to the Court as follows:

That it has instituted in this Court by Bill of Complaint duly filed, an action against the above named defendants as members of the South Carolina Tax Commission, as will more particularly appear from the Bill of Complaint

which is now referred to and made a part of this application. The object and purpose of this suit is to secure from this Honorable Court an interlocutory injunction, and a decree enjoining permanently and perpetually the defendants, who constitute the South Carolina Tax Commission, from enforcing or taking any steps to enforce, or instituting any proceeding whatsoever towards enforcing or giving effect [fol. 22] to, a certain Act of the State of South Carolina approved May 9th, 1931, and entitled "An act to raise revenue for the support of the State Government by the imposition of an excise tax upon electric power generated and sold within this State," set forth in said Bill of Complaint, or to require the plaintiff to comply with any of the provisions thereof, as well as from commencing any suit or proceeding against the plaintiff to enforce or collect any penalties, fines or forfeitures provided for or imposed under said Act, or under any other law of the State of South Carolina, by reason of anything done or omitted to be done by this plaintiff contrary to the terms or provisions of said Act. The further object of this suit is to have this Act declared to be illegal, null and void, and of no force and effect upon the grounds specifically set forth in the Bill of Complaint, which is hereto attached and made a part of this motion.

Plaintiff sets forth in said Bill, alleges and shows that it will suffer irreparable loss, damage and injury, unless a temporary restraining order is issued by the Court pending a hearing upon its application for an interlocutory injunction, as prayed for in said Bill of Complaint, and one of the objects and prayers of said Bill is that upon a hearing for a preliminary injunction being had, then under Section 266 of the Judicial Code an interlocutory injunction, as prayed for in said Bill, be issued, enjoining and restraining the defendants, and each of them, until a final decree herein, in all respects as to which a perpetual injunction is sought in said Bill.

[fol. 23] Wherefore application is now made:

(1) For a temporary restraining order to issue at once, enjoining and restraining all of said defendants from enforcing, or attempting to enforce, the aforesaid Act approved May 9th, 1931, until the further order of this Court; and this plaintiff, as more fully set forth in the Bill of Complaint, avers and shows that said temporary

restraining order is necessary to prevent immediate and irreparable injury, loss and damage to plaintiff, its rights and property, and to preserve the status quo until plaintiff's application for an interlocutory injunction can be set down for hearing and heard upon notice duly given, because payments under the said Act approved 9th May, 1931, attacked in this proceeding and sought to be declared null and void, will under the terms of said Act become payable on or before June 10th, 1931, and plaintiff will be compelled to comply therewith, or incur the penalties provided by law for the violation or disregard thereof, unless the temporary restraining order, for which application is now made, be granted and the enforcement of said Act be restrained until the application for interlocutory injunction can be heard and disposed of under Section 266 of the Judicial Code; and

(2) Application is likewise now made under Section 266 of the Judicial Code for an interlocutory injunction as prayed in said Bill, and upon the grounds and for the reasons therein set forth, and this Honorable Court is petitioned to call to its assistance to hear and determine this application, two other Judges, and that the statutory notice of the hearing of this application be given to the Governor and to the Attorney General of the State of South Carolina, and to all of the defendants to the said Bill, and that an order issue in due course requiring the [fol. 24] defendant to show cause at the time and place to be fixed by this Honorable Court according to law, why said interlocutory injunction should not issue as prayed for in the Bill.

This application is based upon the verified Bill of Complaint which has been duly filed therein.

W. C. McLain, Geo. M. Le Pine, Plaintiff's Solicitors.

IN UNITED STATES DISTRICT COURT

RULE TO SHOW CAUSE ON APPLICATION FOR TEMPORARY RESTRAINING ORDER AND INTERLOCUTORY INJUNCTION

Upon reading the verified Bill of Complaint this day filed in this cause, and the plaintiff having applied for an interlocutory injunction, upon consideration thereof:

It is ordered that the defendants Walter G. Query, J. P. Derham and Frank C. Robinson, constituting the South [fol. 25] Carolina Tax Commission, do show cause before me in the United States Court Room, at Charleston, South Carolina, on the 9th day of June, 1931, at 10:00 o'clock A. M., or as soon thereafter as counsel can be heard, why a Court consisting of three judges as provided by Section 266, amended, of the Judicial Code, should not be convened for hearing the application for interlocutory injunction and why, in the meantime, and until the hearing of said application, and pending the further order of this Court, the said defendants should not be restrained from enforcing, or taking any steps to enforce, directly or indirectly, the terms and provisions of an Act of the General Assembly of South Carolina approved 9th May, 1931, entitled "An Act to raise revenue for the support of the State Government by the imposition of an excise tax upon electric power generated and sold within this State."

Ernest F. Cochran, United States District Judge.

Charleston, S. C., June 6, 1931.

[fol. 26] IN UNITED STATES DISTRICT COURT

ANSWER—Filed July 3, 1931

The joint and several answer of the defendants South Carolina Tax Commission, Walter G. Query, J. P. Derham and Frank C. Robinson, as members of South Carolina Tax Commission, to the bill of complaint of the plaintiff above named, would respectfully show:

First. Defendants admit the allegations contained in the First paragraph of the bill of complaint.

Second. Defendants admit the allegations contained in the second paragraph of the bill of complaint, except that Frank C. Robinson is a resident of the county of Richland, the said Frank C. Robinson being a citizen and resident of the county of McCormick, State of South Carolina.

Third. Defendants admit the allegations contained in the third paragraph of the bill of complaint, but respectfully crave reference to the Act of the General Assembly

of the State of South Carolina as more fully setting forth [fol. 27] its purport and terms than as set forth in the Third paragraph of said bill of complaint.

Fourth. Defendants admit the allegations contained in the fourth paragraph of the bill of complaint. Defendants further aver, upon information and belief, that plaintiff does not own or operate any plant or facilities for generating and manufacturing electricity outside of the State of South Carolina.

Fifth. Answering the fifth paragraph of the bill of complaint, defendants admit that the object of this suit is that plaintiff may be relieved from the payment of the taxes imposed by the Act approved 9th of May, 1931, and that the same be declared illegal, null and void, but these defendants deny that said Act infringes any of plaintiff's constitutional rights, either Federal or State.

Sixth. Defendants have not knowledge or information sufficient to form a belief as to how much electric power is generated by plaintiff nor what the taxes thereon would amount to, but they specifically deny that said Act is illegal, null and void, and that it does not contravene any of the provisions of the Federal or State Constitution therein alleged, or otherwise.

Seventh. Defendants admit the payment of the several other taxes alleged in the seventh paragraph of the bill of complaint, but specifically deny that the State had exhausted its right to tax plaintiff in such other forms as it might elect and that in exacting such other tax there is no impairment of any contract which plaintiff may have had with the State of South Carolina.

Eighth. Defendants have not knowledge or information sufficient to form a belief as to the allegations contained in the eighth paragraph of the bill of complaint; that defend- [fol. 28] ants allege if any electric energy whatsoever is generated by oil or combustion engines within the State of South Carolina, that the electric energy so generated is inconsequential and comparatively so infinitesimal as not to require any consideration in this case.

Ninth. Defendants deny the allegations contained in the ninth paragraph of the bill of complaint.

Tenth. Defendants deny the allegations contained in the tenth paragraph of the bill of complaint.

Eleventh. Defendants admit that plaintiff pays the several taxes enumerated in the eleventh paragraph of the bill of complaint, but they deny each and every other allegation therein contained.

Twelfth. Defendants, upon information and belief, deny so much of the twelfth paragraph of the bill of complaint as alleges that plaintiff is engaged in the operation of a street railway in the city of Columbia, South Carolina, and allege that the said Street Railway in Columbia, South Carolina, is owned and operated by Columbia Railway, Gas and Electric Company. Defendants have not knowledge or information sufficient to form a belief as to the other allegations contained in the twelfth paragraph of the bill of complaint.

Thirteenth. Defendants deny the allegations contained in the thirteenth paragraph of the bill of complaint.

Fourteenth. Defendants deny the allegations contained in the fourteenth paragraph of the bill of complaint.

Fifteenth. Defendants deny each and every allegation contained in the fifteenth paragraph of the bill of complaint.

[fol. 29] For a first, further, separate and distinct defense, these defendants allege that plaintiff has a full, complete and adequate remedy at law, as provided by the Tax Act in question.

For a second, further, separate and distinct defense in point of law arising upon the face of the bill of complaint herein, defendants say that the facts alleged in said bill of complaint are insufficient to constitute a valid cause of action in equity.

For a third, further, separate and distinct defense, it appears from the face of said bill of complaint that the supposed grounds of jurisdiction of the Federal Court are frivolous with no facts alleged to show or make it appear that any real substantial Federal question is involved.

Wherefore defendants deny that the plaintiff is entitled to the relief prayed for in the bill of complaint, or any part

thereof, or to any other relief against these defendants, and pray that the bill of complaint be dismissed with costs.

John M. Daniel, Attorney General for South Carolina; J. Fraser Lyon, Attorneys for Defendants.

[fol. 30] *Duly sworn to by W. G. Query. Jurat omitted in printing.*

[fol. 31] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF W. L. YODER—Filed July 9, 1931

W. L. Yoder being duly sworn, deposes and says:

That he is an officer of the Carolina Power & Light Company, to-wit: its Assistant to the General Manager. That during the month of May, 1931, Carolina Power & Light Company procured electric power and energy from sources of generation in South Carolina as follows:

From Duke Power Company at Wateree and Greenville, South Carolina	7,676,500	K.W.H.
From Lexington Water Power Company at Saluda	6,051,000	K.W.H.
Total	13,727,500	K.W.H.

That the Carolina Power & Light Company sold intrastate in South Carolina during the month of May, 1931, 5,290,365 KWH.

All the above electric power and energy represented by the difference between the amount procured and the amount sold, except what was lost in transformation and transmission, was transmitted from South Carolina into North Carolina; that a portion of the power procured from the Lexington Water Power Company was transmitted from South Carolina to North Carolina.

W. L. Yoder.

Sworn and subscribed to before me this 3rd day of July, 1931. Mary T. Birmingham, Notary Public of Wake County, North Carolina. My commission expires March 11, 1932. (Seal.)

[fol. 32] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF NORMAN H. COIT

STATE OF SOUTH CAROLINA,
County of Richland, ss:

Norman H. Coit, being duly sworn, deposes and says:

1. I reside in the City of Columbia, Richland County, South Carolina, and I am thirty-six (36) years of age. I am a graduate of the University of Colorado, having obtained a Bachelor of Science degree in electrical engineering in 1917. Since that time I have been continuously employed in the supervision of engineering work. From 1924 to 1929 I was General Manager of the Florida Public Service Company, a public utility company engaged in operating electric plants and the distribution of electricity in Florida. Since September, 1929, I have been General Manager and since April, 1930, Vice-President and General Manager of Broad River Power Company and, also, from September, 1929, I have been Vice-President and since December, 1930, Vice-President and General Manager of Lexington Water Power Company. As General Manager of the public utility companies above mentioned I have been directly responsible for the operation of the power plants and electric systems of said companies.

2. Broad River Power Company is a public utility company engaged in operations in the State of South Carolina, with power plants in the City of Columbia, South Carolina, and a large steam and hydro plant at Parr Shoals, South Carolina. During the year 1930 that company produced at its hydro-electric and steam generating stations 169,038,910 [fol. 33] kilowatt hours of electric energy, and deponent estimates that the electric energy produced by said company during the year 1931 will amount to approximately 258,000,000 kilowatt hours.

3. That there are engaged in the business of distributing and selling electricity within the State of South Carolina a number of public service corporations which purchase a large amount of the electricity distributed and sold by them from other companies which generate said electricity. This is true, for example, of the Duke Power Company and Caro-

lina Power & Light Company, which purchase a large amount of electricity from Lexington Water Power Company.

4. That electric energy generated by oil or combustion engines is of exactly the same character as electricity generated by hydro-electric or steam generating plants, and that there are in operation in the State of South Carolina plants which generate electricity by oil or combustion engines. Examples of such plants are the plant of South Carolina Power Company at McClellanville, South Carolina, and the Hardeeville Ice Plant which is owned by a private individual. Each of said plants is of more than ten horse power capacity.

5. That Broad River Power Company in the operation of its electric business generates a large amount of electric energy which is used by it for lighting its own premises and for power purposes on its own premises, the amount so used amounting to approximately 14,000,000 kilowatt hours per year, and that in addition thereto it consumes a large amount of energy which is furnished to its own bona fide employees residing on the premises of the company, the amount so used amounting to approximately 26,000 kilowatt hours per year. In addition thereto Broad River Power Company, pursuant to a judgment of the Supreme Court of South Carolina, is responsible for the operation of the street railway system in the City of Columbia, South [fol. 34] Carolina, which said system is and can be operated only at a loss, excluding from consideration any compensation for electricity generated, and that in the operation of said system Broad River Power Company consumes a large amount of electric energy generated by it, the amount so used amounting to approximately 750,000 kilowatt hours per year. That in addition to these uses by Broad River Power Company it consumes a large amount of electricity generated by it for the purpose of maintaining voltages on transmission and distribution lines, the amount so used amounting to approximately 39,500,000 kilowatt hours per year.

6. That Broad River Power Company paid in taxes to the State of South Carolina applicable to the twelve months ending on December 31, 1930, $279,792.65, and in addition

thereto paid to municipalities for taxes and licenses the sum of $2,730, such taxes being divided as follows:

Income tax	42,433.18
Tax for support of railroad commission	4,026.31
Gross income tax	6,917.59
Three mill tax on true value	24,378.79
Municipal and other licenses	2,730.00
Property taxes (Including municipal & County property tax)	202,036.78

7. That deponent is informed and believes, the source of his information being statements from persons connected with the below named textile plants, that Clifton Manufacturing Company, Victor Cotton Mills, Jackson Cotton Mills, Panola Cotton Mills, Enoree Manufacturing Company and Ware Shoals Manufacturing Company are all textile plants which make a part or all of the electric power used by them, and also furnish electric energy for lighting the houses occupied by their employees.

8. That Broad River Power Company owns and operates in the town of Saluda, South Carolina, a plant for the manufacture of ice, which during the calendar year 1930 consumed 100,165 K.W.H.

That the taxes so paid represented 9.9% of the total op-
[fol. 35] erating revenues of the company and that in addition thereto the company paid Federal taxes to the amount of $35,888.70, the total taxes paid by the company representing 11.2% of its total operating revenues.

N. H. Coit.

Sworn and subscribed to before me this 3rd day of July, 1931. N. O. D. Bultman, Notary Public.

[fol. 36] In United States District Court

Opinion—Filed Sept. 7, 1931

Parker, Circuit Judge:

These are three independent suits instituted to enjoin the enforcement of the South Carolina statute imposing

a tax on the production and sale of electric power. An interlocutory injunction is asked in each, and a court of three judges has been convened pursuant to section 266 of the Judicial Code and the cases have been heard together. Each suit involves an amount largely in excess of what is required for purposes of jurisdiction; and jurisdiction in equity is not controverted and unquestionably exists for the purpose of avoiding a multiplicity of suits.

The statute in question is entitled, "An Act to Raise Revenue for the Support of the State Government by the Imposition of an Excise Tax upon Electric Power Generated and Sold Within This State"; and the pertinent provisions thereof are as follows:

"Section 1. Be it enacted by the General Assembly of the State of South Carolina:

(a) That in addition to all other taxes of every kind now imposed by law, every person, firm or corporation engaged in the business of manufacturing or generating hydro-electric power in the State of South Carolina shall be subject to the payment of an excise, license or privilege tax of five-tenths of one mill upon each kilowatt hour of hydro-electric power manufactured or generated, and said tax shall be paid to and collected by South Carolina Tax Commission.

"(b) That in addition to all other taxes of every kind now imposed by law, every person, firm or corporation engaged in the business of manufacturing or generating electric power by the use of steam power in the State of South Carolina shall be subject to the payment of an excise, license, or privilege tax of five-tenths of one mill upon each kilowatt hour of electric power so manufactured or generated and said tax shall be paid to and collected by South Carolina Tax Commission.

"(c) That in addition to all other taxes of every kind now imposed by law, every person, firm or corporation engaged in the business of selling electric power within the State of South Carolina shall be subject to the payment of an excise, license, or privilege tax of five-tenths of one mill upon each kilowatt hour of electric power sold in the State of South Carolina and said tax shall be paid to and collected by South Carolina Tax Commission: Pro-

[fol. 37] vided, that if such seller procures electric power which has been subject to the payment of the excise, license or privilege tax hereinbefore provided a credit on said tax to the amount of the excise tax already required to be paid by the person, firm or corporation generating the same within this State shall be allowed; Provided, further, that the provisions of this Act shall not apply to the electric power manufactured or generated in another State and brought into this State until such power has lost its interstate character and immunities: Provided, further, that the provisions of this Act shall not apply to any person, firm or corporation owning and operating an electric manufacturing or generating plant of ten horse power or less, nor shall the provisions of this Act apply to industrial plants manufacturing or generating power for its own use, or for use upon its own premises by its bona fide operatives or employees but the tax shall be paid upon so much thereof as may be sold to other than its employees: Provided, further, that the provisions of this Act shall not apply to municipalities manufacturing or generating electricity for the use of its customers.

* * * * * * *

"Section 6. For the year 1931 the revenue produced under this Act shall reduce the 1931 property levy for State purposes to the full amount raised under the terms of this Act: Provided, further, that for the year 1932 and thereafter, the revenue derived under the provisions of this Act shall be turned into the State Treasury for the support of the State Government."

The statute is attacked from different angles by the complainants in the various suits. The Broad River Power Company generates, sells and uses current within the state of South Carolina; and it attacks both the production and the sales tax of the statute as being violative of the due process and equal protection clauses of the 14th Amendment and similar provisions in the Constitution of South Carolina. The Lexington Power Company generates current within the state of South Carolina which is sold to another company and transmitted to other states; and it attacks the production tax as a burden upon interstate

commerce as to current transmitted to other states, as well as being in violation of the 14th Amendment and similar provisions of the South Carolina Constitution. The South Carolina Power Company, in addition to generating and selling current within the state of South Carolina, brings [fol. 38] in from the state of Georgia current which it sells in South Carolina; and in addition to attacking both the generation tax and the sales tax under the 14th Amendment and the Constitution of South Carolina, it attacks the sales tax in so far as it affects electricity brought into the state for sale therein both as burdening interstate commerce and as discriminating against such commerce. The Lexington Power Company and the South Carolina Power Company, in addition to their other positions, contend that their power plants for the generation of electricity, which are maintained in navigable rivers under authority granted by the federal government, are agencies of the federal government in aid of navigation and are not subject to taxation at the hands of the state. The following questions, therefore, are raised by the cases before us:

(1) whether the statute violates the fundamental guaranties of due process and equal protection contained in the 14th Amendment and in the Constitution of South Carolina;

(2) whether it violates the Commerce Clause of the Constitution with respect to electric current generated within the state and transmitted to other states or with respect to current brought in from other states and sold within the state; and

(3) whether it constitutes a burden upon a means or agency of the federal government with respect to those companies which are maintaining power plants in navigable streams under authority given them by Congress and the Federal Power Commission. We shall consider these questions in the order named.

Questions under the 14th Amendment and the Constitution of South Carolina

Complainants contend that the statute amounts to a denial of due process and equal protection: (1) because it does not tax generation of electricity by the use of oil or

internal combustion engines and does not tax persons furnishing gas to the public for light, heat or power; (2) [fol. 39] because it exempts from its operation industrial plants generating power for their own use or the use of their employees, and municipalities generating electricity for the use of their customers; (3) because it exempts from the sales tax electric current upon which the generation tax has already been paid; (4) because it is said that the statute is indefinite and fails to provide means for determining the tax on current brought from without and sold within the state; and (5) because it is said that, as to the tax imposed for the year 1931, the statute taxes power companies for the benefit of persons paying the general property tax levied by the state of South Carolina. None of these positions, we think, can be sustained.

As to the failure to tax gas companies and the generation of electricity by oil or the use of internal combustion engines, it is elementary that, in levying a tax, a state need not cover the whole field of possible taxation, but that it may classify for that purpose so long as the classification has a reasonable basis. State Board of Tax Com'rs of Indiana v. Jackson, — U. S. —, 51 Sup. Ct. 540; Alward v. Johnson, — U. S. —, 51 Sup. Ct. 273; Brown, Forman Co. v. Kentucky, 217 U. S. 563; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232. If not palpably arbitrary the classification is valid. Metropolis Theater Co. v. Chicago, 228 U. S. 61, 62; Toyota v. Hawaii, 226 U. S. 184. And it is the duty of the court to sustain it if any state of facts can be conceived of upon which the classification may reasonably rest. Rast v. Van Deman, 240 U. S. 342; Wampler v. Lecompte, — U. S. —, 51 Sup. Ct. 92; State Board of Tax Commissioners of Indiana v. Jackson, supra, —U. S. —, 51 S. Ct. 540.

In the case last cited, which involved the Indiana chain store tax, the rule is thus stated by Mr. Justice Roberts:

[fol. 40] "The principles which govern the decision of this cause are well settled. The power of taxation is fundamental to the very existence of the government of the states. The restriction that it shall not be so exercised as to deny to any the equal protection of the laws does not compel the adoption of an iron rule of equal taxation, nor prevent variety or differences in taxation, or discretion in the selection of

subjects, or the classification for taxation of properties, businesses, trades, callings, or occupations, Bell's Gap R. R. v. Pennsylvania, 134 U. S. 232, 10 S. Ct. 533, 33 L. Ed. 892; Southwestern Oil Co. v. Texas, 217 U. S. 114, 30 S. Ct. 496, 54 L. Ed. 688; Brown-Forman Co. v. Kentucky, 217 U. S. 563, 30 S. Ct. 578, 54 L. Ed. 883. The fact that a statute discriminates in favor of a certain class does not make it arbitrary, if the discrimination is founded upon a reasonable distinction, American Sugar Refining Co. v. Louisiana, 179 U. S. 89, 21 S. Ct. 43, 45 L. Ed. 102, or if any state of facts reasonably can be conceived to sustain it. Rast v. Van Deman, 240 U. S. 342, 36 S. Ct. 370, 374, 60 L. Ed. 679, L. R. A. 1917A, 421, Ann. Cas. 1917B, 455; Quong Wing v. Kirkendall, 223 U. S. 59, 32 S. Ct. 192, 56 L. Ed. 350. As was said in Brown-Forman Co. v. Kentucky, supra, at page 573 of 217 U. S., 30 S. Ct. 578, 580; 'A very wide discretion must be conceded to the legislative power of the state in the classification of trades, callings, businesses, or occupations which may be subjected to special forms of regulation or taxation through an excise or license tax. If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law.' "

The act before us cannot be said to be palpably arbitrary in that it does not tax the generation of electricity by the use of combustion engines, nor because it does not tax persons furnishing gas to the public for light, heat and power. The business of producing and selling gas is so fundamentally different from the generation of electric power, that to point out the difference which might furnish a basis for the taxation of one and not the other is clearly unnecessary. The same is true of the production of electric current by the use of oil or internal combustion engines. The record shows that only two very small plants in the state of South Carolina are engaged in producing electricity in this manner; and, if the legislature knew of their existence at all, it may well have determined that [fol. 41] the volume of their business was so small and their relative cost of production so great as to put them in a class entirely different from the great power companies producing current from water power and coal. The purpose of

the legislature was evidently to tax the generation of electric current by the hydro-electric companies which utilize the water power in the rivers of South Carolina, one of the great natural resources of that state. The generation of current by the use of steam power was taxed because it is a matter of common knowledge that the hydro-electric companies use steam power to supplement water power in the production of their current and also because current produced by steam power is the great competing factor on the market with current produced by water power. In so far as companies producing electric current by means of internal combustion engines may sell the current produced, they are not exempted from the tax imposed by the statute, but are reached by the sales tax imposed by subsection (c) of section 1. We do not regard this, however, as a matter of importance in sustaining the tax imposed by subsections (a) and (b); for we are satisfied that the classification of companies producing electricity by water power and steam for purposes of taxation is a reasonable one which must be sustained.

In Quong Wing v. Kirkenhall, 223 U. S. 59, a statute was sustained which imposed a tax on hand laundries, but did not apply to steam laundries, and excepted from its operation laundries not employing more than two women. In Cargill v. Minnesota, 180 U. S. 452, a statute was sustained which required warehouses situate on the right of way of a railroad to secure a license from a state commission but made no such requirement of other warehouses. In Armour Packing Co. v. Lacy, 200 U. S. 226, an occupation tax was sustained upon meat-packing houses which distributed [fol. 42] their products from depots, although no such tax was imposed upon wholesalers and commision merchants. In Ohio River R. Co. v. Dittey (Ohio Tax Cases), 232 U. S. 576, an excise tax upon the gross earnings of railway companies was upheld, although no such tax was placed on the earnings of other public utilities. In Puget Sound Power Co. v. King Co., 264 U. S. 22, it was held that the property of a street railway company might be taxed upon a different basis from the property of steam railways. In Alaska Fish Salting Co. v. Smith, 255 U. S. 44, a tax was sustained upon the manufacture of fish oil, fertilizer and fish meal from herring, although at a greater rate than was imposed upon similar use of other fish. In Heisler v.

Thomas Colliery Co., 260 U. S. 245, it was held that a tax on anthracite but not on bituminous coal did not violate the equal protection clause, and that the fact of commercial competition between the two did not prevent the state from classifying them separately for purposes of taxation. In the light of these decisions, a statute which taxes companies producing electric current by water power and steam without taxing gas companies and the comparatively insignificant companies which produce current by the use of internal combustion engines, cannot be said to make an arbitrary classification which denies the equal protection of the laws.

Like reasoning applies to the contention that the statute denies the equal protection guaranteed by the Amendment in that it exempts from the tax industrial plants generating power for the use of themselves and their employees, and municipalities generating electricity for the use of their customers. Such industrial plants and municipalities are manifestly in an entirely different class from power companies generating electricity for sale to the public. So far as the exemption extended to industrial plants is concerned, the case is clearly governed by American Sugar [fol. 43] Refining Co. v. Louisiana, 179 U. S. 89, which dealt with a statute imposing a license tax upon persons refining sugar and molasses, but exempting from the tax "planters and farmers grinding their own sugar and molasses." In sustaining the constitutionality of the statute, the court, speaking through Mr. Justice Brown, said:

"The act in question does undoubtedly discriminate in favor of a certain class of refiners, but this discrimination, if founded upon a reasonable distinction in principle, is valid. Of course, if such discrimination were purely arbitrary, oppressive or capricious, and made to depend upon differences of color, race, nativity, religious opinions, political affiliations or other considerations having no possible connection with the duties of citizens as taxpayers, such exemption would be pure favoritism, and a denial of the equal protection of the laws to the less favored classes. But from time out of mind it has been the policy of this government, not only to classify for purposes of taxation, but to exempt producers from the taxation of the methods employed by them to put their products upon the market.

The right to sell is clearly an incident to the right to manufacture or produce, and it is at least a question for the legislature to determine whether anything done to prepare a product most perfectly for the needs of the market shall not be treated as an incident to its growth or production."

Here the generation of electricity by manufacturers for the use of themselves and their employees is clearly no more than an incident of the business of manufacturing in which they are engaged and, both practically and theoretically, stands upon an entirely different footing from the generation of current for sale to the public. See also Armour & Co. v. Virginia, 246 U. S. 1, which sustained a taxing statute which imposed a tax on merchants based on the amount of their purchases, including as purchases all goods and merchandise manufactured by the licensee and sold or offered for sale within the state, but excluded from its operation domestic manufacturers, taxed on capital by the state, who offered for sale at the place of manufacture goods manufactured by themselves. In upholding this statute against the charge that it denied the equal protection guaranteed by the 14th Amendment, Chief Justice White said that the distinction upon which the classification of [fol. 44] the statute rested was so obvious as to require nothing more than a mere statement of the two classes. We think the same is true of the classification here.

So far as the exemption accorded municipalities is concerned, a municipality is an agency of the state, and its operations are conducted, not for private profit, but for the benefit of the public or its citizens. Irvine v. Town of Greenwood, 89 S. C. 511, 72 S. E. 228. Its property and business conducted by it are ordinarily not taxed at all; and legislation of the state taxing or exempting same from taxation is not open to the objection that it offends the equal protection clause of the 14th Amendment. See Hardwick v. Wolcott, 98 Vt. 343, 129 A. 159, 39 A. L. R. 1222 and note.

Our attention is called to section 4, article 10 of the Constitution of South Carolina, which provides that "there shall be exempted from taxation all county, township and municipal property used exclusively for public purposes and not for revenue"; and the argument is made that the legislature, because of this provision, is without power to

exempt from taxation the business of a municipal lighting or power plant operated for revenue. The constitutional provision in question, however, merely requires that the legislature exempt from tax the property mentioned therein. There would seem to be nothing in it which would require the legislature to impose an excise tax on the business operated by municipalities; and in the absence of a holding of the Supreme Court of South Carolina to that effect we cannot give it such construction. As we said in Doscher v. Query, 21 Fed. (2d) 521, 528:

"The question as to whether the statute under consideration violates the Constitution of South Carolina has not been passed upon by the Supreme Court of that state; and federal courts are reluctant to adjudge a state statute to be in conflict with the state constitution before that question has been considered by the state tribunals, especially [fol. 45] where the statute is one affecting the revenues of the state. Michigan Cent. R. Co. v. Powers, 201 U. S. 245, 291; 26 S. Ct. 459, 50 L. Ed. 744; Coulter v. Louisville & Nashville R. Co., 196 U. S. 599, 609, 25 S. Ct. 342, 49 L. Ed. 615. They will not do so unless the case 'imperatively demands such a decision.' Louisville & N. R. Co. v. Garrett, 231 U. S. 298, 305, 34 S. Ct. 48, 51 (58 L. Ed. 229.)"

It is argued that the sales tax imposed by section (c) of the act violates the equal protection clause of the Federal Constitution and also the rule of uniformity prescribed by article 10, section 1, of the Constitution of South Carolina, because it exempts from the tax sales of current upon which the generation tax has already been paid. We think, however, that this point is entirely without merit. The evident purpose of the act is to impose a tax upon the current used within the state and to impose it at the source or as soon as the current becomes subject to the jurisdiction of the taxing power, but not to impose it but once (Cf. Texas Co. v. Brown, 258 U. S. 466, 479). If current produced as well as sold within the state were subjected to the sales tax, such current would rest under a double burden of taxation. To avoid this and at the same time to preserve the system of taxing at the source, current which is produced within the state is taxed at the time of generation but is relieved of the sales tax, which is equal in amount, with the result

that all current sold within the state, whether produced there or brought in from another state, pays exactly the same tax. If there is any discrimination, it is in favor of the current brought in; for such current does not pay tax upon the "line loss", whereas the generation tax does not make provision for this loss. The situation is precisely that with which the Supreme Court dealt in Hinson v. Lott, [fol. 46] 8 Wall. 148. In that case the state of Alabama had levied a tax of 50 cents per gallon on all spirituous liquors manufactured within the state. A subsequent section of the act provided that dealers introducing such liquors into the state should, before offering same for sale, pay a similar tax upon every gallon thereof. What the Supreme Court said in answer to the contention that this constituted a burden upon and a discrimination against interstate commerce as to the liquor brought in answers equally the contention here that the exemption in favor of the current upon which the tax has been paid discriminates against the current brought in upon which it has not been paid. Said the Court:

"A tax is imposed by the previous sections of the same act of fifty cents per gallon on all whiskey and all brandy from fruits manufactured in the State. In order to collect this tax, every distiller is compelled to take out a license and to make regular returns of the amount of distilled spirits manufactured by him. On this he pays fifty cents per gallon. So that when we come in the light of these earlier sections of the act, to examine the 13th, 14th, and 15th sections, it is found that no greater tax is laid on liquors brought into the State than on those manufactured within it. And it is clear that whereas collecting the tax of the distiller was supposed to be the most expedient mode of securing its payment, as to liquors manufactured within the State, the tax on those who sold liquors brought in from other states was only the complementary provision necessary to make the tax equal on all liquors sold in the State. As the effect of the act is such as we have described, and it institutes no legislation which discriminates against the products of sister States, but merely subjects them to the same rate of taxation which similar articles pay that are manufactured within the State, we do not see in it an at-

tempt to regulate commerce, but an appropriate and legitimate exercise of the taxing power of the States."

In Doscher v. Query, supra, 21 Fed. (2d) 521, we dealt with a statute of South Carolina imposing a stamp tax on the sale of tobacco products within the state and requiring the affixing of stamps by manufacturers, wholesalers and retailers, but providing that where stamps had been once affixed no further stamps should be required. The tax was [fol. 47] assailed, just as is the tax here, on the ground that it discriminated against unstamped products brought into the state in favor of products produced within the state upon which the stamp tax had been paid by the producer. And there, just as here, the tax was attacked as violative of article 10, section 1, of the South Carolina Constitution, and the decision in Standard Oil Co. v. Spartanburg 66 S. C. 37, 44 S. E. 377, was relied on. In upholding the validity of the statute, we said:

"It will be noted that the section (of the Constitution) relied on expressly authorizes graduated license taxes on occupations and business, and, if the tax in question be considered an occupation or business tax, graduation in accordance with sales would seem to be expressly authorized. If it be considered a tax on sales, there is nothing in the section of the Constitution to invalidate any of its provisions, as it is undoubtedly made at a uniform and equal rate, levying the same tax on all articles of merchandise of the same sort sold within the state. The idea that the rule of uniformity is violated because only one tax is imposed on each article and only one stamp is required to be placed on it, even though it may have been sold a number of times, is not well grounded. It is a matter of common knowledge that a tax of this sort is shifted from dealer to dealer and is ultimately paid by the consumer, and we can think of no better way of securing uniformity in a sales tax than by imposing the tax on the article itself, as is in effect done in this case.

"The question here is very different from that involved in Standard Oil Co. v. Spartanburg, 66 S. C. 37, 44 S. E. 377, especially relied upon by complainants. There an ordinance of the city of Spartanburg imposed a flat license tax of $250.00 per year on dealers in oils, but exempted

from paying the tax dealers handling oils on which the license had been paid. The Supreme Court of South Carolina held that the ordinance made an unreasonable classification, and was therefore void. But in that case the effect of the ordinance was to exempt from taxation dealers handling oils purchased from dealers who had themselves paid the flat license tax, the exemption applying not to the oil but to the dealer. Here no one is exempted from paying the tax imposed, but it is collected from the dealer or manufacturer who has the goods in possession prior to the first sale within the state. To provide that no one shall be required to pay an additional tax with respect to the sale of these particular goods, as to which we may safely assume that the tax paid is added to the price, is manifestly a very different thing from providing that retail dealers in oil shall be exempted from paying a [fol. 48] flat annual license tax because they happen to purchase from a wholesaler who has paid the same tax."

It is next argued by the complainant South Carolina Power Company that the statute deprives it of property without due process of law, in that it fails to provide any certain means for determining the tax on current brought into the state. The statute provides that it shall not apply to electric power generated in another state and brought into South Carolina until such power has lost its interstate character; and the objection is that no means is provided for determining when the current loses its interstate character and becomes subject to the tax. In the light of the evidence as to how current is brought into South Carolina by the South Carolina Power Company, however, this objection loses all substance. The current comes into South Carolina in interstate commerce on high tension wires at a voltage of 44,000 volts. All of it is used in South Carolina, but before it is used it is "stepped down" to a lower voltage and thus prepared for use in the state. As we shall show later, it loses its interstate character at this time. There is no difficulty in determining to a practical certainty how much current is thus "stepped down" and sold within the state of South Carolina, even though the high voltage current brought into the state is run over the same wires that carry the current produced in the state. The current generated in South Carolina by the South Caro-

lina Power Company and the current sold by it in that state are measured by its electric meters with absolute accuracy; and the method adopted in computing the tax on current brought in and sold is to add the total kilowatt hours coming into South Carolina (37,450,000) to the number generated in South Carolina (40,000,000); and from this total (77,450,000) compute the line loss (14,760,339 or 19%). This percentage of loss is applied on the current [fol. 49] coming into the state which gives the line loss on this current (7,115,500). This is subtracted from the current brought into the state; and the result (30,334,500) represents the amount of current brought into the state and sold. It is objected that there is no average of transmission loss; but the method adopted would seem to be reasonably fair and accurate, as much so, at least, as most methods in use for computing taxes on the profits of business, which are universally upheld. If absolute accuracy in matters of this sort were necessary to the validity of taxes, most modern taxing systems would be found invalid.

Little need be said as to the point that the tax is levied for the benefit of private persons paying the general property tax in that the statute provides that the proceeds of the tax for the year 1931 shall go to reduce the property levy for that year. Every tax levied, in theory at least, reduces other taxes. When a part of the public revenue is collected from excises, a smaller amount is required from the tax on property; and whether the legislature, after providing for the collection of an excise, takes this into account and prepares to balance the budget by levying a smaller tax on property, or whether, after making the levy on property, it provides that the revenue realized from an excise shall reduce that levy, is manifestly immaterial. In either event the amount raised by the excise is used for public purposes; and the fact that the property owner may have benefited by the levy of the excise because of the reduction of the taxes on property, is no more material in the one case than in the other. A tax cannot be said to be levied for the benefit of private persons simply because, on account of the revenue to be derived from same, the legislature has seen fit to lower the tax rate on their property. Whether a tax shall be raised or reduced, or whether revenue shall be raised [fol. 50] by one system or by another, are matters committed necessarily to the discretion of the legislature, with the exercise of which the courts cannot interfere.

Questions under the Commerce Clause

The principal questions under the commerce clause of the Constitution are based upon what is said to be the inherent nature of the generation and transmission of electric power. It is said that only so much power is generated as is needed to supply the user; that the whole system is so connected and regulated that, whether produced by water power or by steam, the generators produce only so much current as is called for at any given time by the use made of the current by the customer; that electricity travels at the rate of light, i. e., at the rate of 186,000 miles per second, with the result that current is generated and transmitted instantaneously to the customer when he signifies his need of it by turning on his light, motor or other device using current; and that the transmission of current to the customer in interstate commerce must be treated, therefore, as generation and transmission in response to order, which the state cannot burden by taxation. The process of generation and transmission is thus described in the affidavit of Dr. Robert A. Millikan, one of the most distinguished physicists of the country:

"The terms 'generation,' 'manufacture' and 'production' as applied to energy in the electrical form are merely convenient designations applied to one aspect of the process of transferring energy from some source in nature (such as falling water) to some point where it may be usefully applied. The various electrical facilities used in said process are purely transferring devices, and the entire combined process—electric, magnetic and mechanical—is integral, continuous and essentially simultaneous, as electricity travels approximately with the speed of light—186,000 miles per second.

"There is a continuous electrical and electromagnetic path between the windings in the generator and the windings in the consumer's motor (or between the generator windings and the filament in an electric lamp or the elec- [fol. 51] trodes in an electrochemical cell). The entire electric system is a device for transferring the force of the falling water to and applying it at the point where it is to be utilized. Except as, and to the extent that, energy is called for and used at the final point of utilization, the electric generator neither receives from the water wheel shaft

nor delivers to the electric transmission lines any energy other than that necessary to hold the equipment under constant rotation and electric charge in instant readiness to serve.

* * * * * * *

"In the commercial generation, transmission and distribution of electricity the process is essentially unchanged. Electricity generated at different stations may, for commercial convenience, reliability of service, and similar factors, be brought together at a single distributing station or substation, as it is sometimes called, from which point it is in turn distributed over different lines to consumers' different points of use. If no consumer is using power on any distribution line no demand is placed on the generators and no electricity is generated, except as above stated, that necessary to hold the equipment under rotation and electric charge. If the aggregate electrical demand of the various consuming devices of the different consumers is less than the capacity of the generators, that part of the generating equipment which is not required to serve the immediate present combined demands of the various consumers remains idle, or delivers only such power or electricity as is required to meet the combined demands of the consumers. Similarly, meters placed at the generating station, or at any point between the generating station or stations and the distributing substation, register the power output (subject to losses as they vary from point to point) required to meet the then total demands of all the consumers, and the duration of such aggregate total demands. They afford measurements of aggregate consumers' use as well as measurements of generation, because the two are correlative.

"The various processes involved in stepping up and stepping down electricity through transformers involve no change in the essential nature of the electrical processes herein first above mentioned. They are merely devices adapted to the needs of the particular situation developed primarily with a view to efficiency and economy in operation. For illustration, electricity could be generated at 6600 volts and economically transmitted from the station for a distance of a few miles, and used by a consumer whose motors operated at that voltage without any process of transformation at either end of the circuit. This would probably be done under such conditions of transmission and

use. But as distances of transmission increase, transmission at such a relatively low voltage involves either ex- [fol. 52] cessive size of conductors or excessive losses in transmission and the economic and practical thing to do is to step up the voltage (increase the pressure) for economy in transmission. The transformers, therefore, are merely an aid to the transfer or transmission of energy in the electrical form, or what we call electricity."

We think, however, that the argument of complainants ignores or at least does not accord sufficient importance to the part played by the transformer in the system of electrical transmission. Electricity is produced at a low voltage. For transmission over long distances it is "stepped up" by a transformer to a very high voltage; and all of the current transmitted in interstate commerce by complainants is thus "stepped up" before transmission in such commerce. Before it can be used by the consumer it must be "stepped down" again to a low voltage; and all of the current received by complainants in interstate commerce is thus stepped down before being sold to or used by the consumer. And this "stepping up" or "stepping down" is not a mere change produced in the current. It is the production of a new and different current. The principle of the transformer is that the current flowing in the wires coming into the transformer sets up an induced current in the magnetic core of the transformer and this causes an induced current to flow in the wires going out of the transformer, the voltage depending upon the relative number of coils of the wires carrying the current in and those carrying the induced current out. These wires are insulated from each other, and the current going out is not the current coming in, but a new and different current, although induced by the former. Encyclopedia Britannica, 14th Ed., Article "Transformers". The current produced by induction in the transformer results from the use of the original current but is not that current, just as current produced by steam [fol. 53] results from the use of coal but is not the coal.

Now, so far as the production or generation tax on current is concerned, there can be no question as to its validity as applied to current transmitted in interstate commerce, we think, even though the current transmitted be conceived of as the identical current produced. The production of an article for transmission in interstate commerce is not

in itself such commerce. Leather Workers v. Herkert, 265 U. S. 457; United Mine Workers v. Coronado Co., 259 U. S. 344; D., L. & W. R. R. v. Yurkonis, 238 U. S. 439. And there can be no question but that such production is taxable by the state.

In Oliver Iron Co. v. Lord, 262 U. S. 172, the state of Minnesota had imposed a tax on the business of mining iron ore measured by a percentage of the value of the ore mined or produced. Substantially all of the ore when mined was loaded on cars and shipped into other states to satisfy existing contracts. In holding that the tax on production was not a burden on interstate commerce, though the ore was destined for transportation in such commerce even before it was mined, the court, speaking through Mr. Justice Van Devanter, said:

"The ore does not enter interstate commerce until after the mining is done, and the tax is imposed only in respect of the mining. No discrimination against interstate commerce is involved. The tax may indirectly and incidentally effect such commerce, just as any taxation of railroad and telegraph lines does, but this is not a forbidden burden or interference."

The same holding has been made with respect to the production tax on gas (Hope Natural Gas Co. v. Hall, 274 U. S. 284); a tax on coal prepared and "ready for shipment or market" and destined for a market in other states (Heisler v. Thomas Colliery Co., supra); and a manufacturing tax upon goods sold in interstate commerce (American Mfg. Co. v. St. Louis, 250 U. S. 459).

[fol. 54] The case of Hope Gas Co. v. Hall, supra, supporting the production tax on gas, would seem to be directly in point as supporting the tax here; for the gas in that case, just as the electricity here, was transmitted immediately in interstate commerce. The fact that the gas went through pipes, whereas the electric energy is transmitted by wires, or that a longer time is required for the transmission of gas than is required for the transmission of electricity, or that gas is a material which is understood whereas electricity is a force which is not understood, would seem to make no difference with respect to the principal involved.

As pointed out above, however, it clearly appears that the current generated in South Carolina, upon which the

tax is imposed, is not the current transmitted in interstate commerce. The current upon which the tax is imposed is the generated low voltage current; the current transmitted in interstate commerce is the high voltage current induced in the transformers of the company. The statute does not attempt to impose a tax upon this.

And we think it equally clear that the tax imposed upon the sale of current does not burden interstate commerce as to current brought from without the state. The tax is not imposed on the high voltage current which passes in interstate commerce. It is imposed on the low voltage current which is sold to the consumer, and is an excise tax on the business of selling that current. The high voltage current which comes into the state is not sold. It is used to induce in the transformer the low voltage current which is sold. Even if the current sold be considered as the current which is brought in, it has gone through a process in which it has been "broken up" or changed from one current of high voltage to many currents of low voltage; and [fol. 55] it is these many currents of low voltage sold within the state upon the sale of which the tax is levied. While electric current can hardly be said to "come to rest" within a state, its interstate journey ends at the transformer which uses it for the production of low voltage currents for use within the state. The situation is the same in principle as the breaking up of an original package after shipment in interstate commerce (cf. Brown v. Maryland, 12 Wheat. 419, 443), or the breaking up of a cargo of oil after its interstate journey and the sending of it in tank cars to the points where needed within the state (A. C. L. R. Co. v. Standard Oil Co., 275 U. S. 257; A. C. L. R. Co. v. Standard Oil Co. (C. C. A. 4th), 12 Fed. (2d) 541), or the distribution of gas in low pressure pipes after it has been brought into the state in high pressure pipes in interstate commerce. East Ohio Gas Co. v. Tax Commission of Ohio, — U. S. —, 51 Sup. Ct. 499.

The case last cited is directly in point. There the state of Ohio had imposed a tax on the sale of gas within the state. A company brought in gas from other states in high pressure pipe lines. From these lines it was distributed to consumers by means of low pressure supply mains. The reduction of the current of gas from high pressure to low pressure for local use, while different mechanically, is the same from the standpoint of legal principle as the reduction

of a high voltage current to low voltage for local use. In sustaining the right of the state to impose the tax, the Supreme Court, speaking through Mr. Justice Butler, said:

"The transportation of gas from wells outside Ohio by the lines of the producing companies to the state line and thence by means of appellant's high pressure transmission lines to their connection with its local systems is essentially national—not local—in character and is interstate commerce within as well as without that state. * * * But when the gas passes from the distribution lines into the supply [fol. 56] mains, it necessarily is relieved of nearly all the pressure put upon it at the stations of the producing companies, its volume thereby is expanded to many times what it was while in the high pressure interstate transmission lines, and it is divided into the many thousand relatively tiny streams that enter the small service lines connecting such mains with the pipes on the consumers' premises. So segregated the gas in such service lines and pipes remains in readiness or moves forward to serve as needed. The treatment and division of the large compressed volume of gas is like the breaking of an original package, after shipment in interstate commerce, in order that its contents may be treated, prepared for sale and sold at retail. State v. Flannelly 96 Kan. 372, 383-384, 152 P. 22; W. Va. & Md. Gas Co. v. Public S. Com., 134 Md. 137, 143-145, 106 A. 265; Cf. Atlantic Coast Line v. Standard Oil Co., 275 U. S. 257, 269, 48 S. Ct. 107, 72 L. Ed. 270; Brown v. Maryland, 12 Wheat. 419, 6 L. Ed. 678; Leisy v. Hardin, 135 U. S. 100, 10 S. Ct. 681, 34 L. Ed. 128. It follows that the furnishing of gas to consumers in Ohio municipalities by means of distribution plants to supply the gas suitably for the service for which it is intended is not interstate commerce, but a business of purely local concern exclusively within the jurisdiction of the state."

The point that the tax on sales is a discrimination against current which has passed in interstate commerce because current which has paid the local generation tax is exempted from the sales tax, has already been considered in discussing the points raised under the 14th Amendment. The cases of Hinson v. Lott, supra, 8 Wall. 148, and Doscher v. Query, supra, 21 Fed. (2d) 521, 525, sufficiently answer this position.

The Question of Federal Agency

The South Carolina Power Company generates at its Stevens Creek plant on the Savannah River the electric current which it brings into the state of South Carolina; and it argues that in maintaining the dam and plant at which the current is generated it is acting as an agency of the federal government in aid of navigation and is not taxable by the state upon the generation or sale of the current there produced. The same point is made by the Lexington Power Company, the plant of which is maintained upon the Saluda [fol. 57] River. Both rivers are navigable streams and both plants were constructed under licenses from the federal government, license being granted to the South Carolina Power Company by certain acts of Congress and to the Lexington Power Company by the Federal Power Commission. Both companies point, just as did the Susquehanna Power Company in the case recently decided by the Supreme Court (51 Sup. Ct. 434) to the licenses granted them by the Federal government, to the fact that their plants were constructed in accordance with plans required under their license and approved by officials of the government, to the provisions of law subjecting them to regulatory and supervisory powers of the government extending to construction, maintenance, operation, financing, rates, service and accounting, and to the right of the government at the expiration of the license to take over and operate the property upon the payment of just compensation.

We cannot accept this contention. Complainants, in the production and sale of power, are not acting as agents of the government, but are engaged in private business for profit. To obtain licenses to build their dams in navigable streams, they have, it is true, consented to certain restrictions and conditions imposed by the government; but it does not follow that because of this they have made the private business in which they are engaged an instrumentality of the federal government and thus exempted it from taxation by the state. If a private business conducted for profit is to be exempted from taxation by one of our dual sovereignties because enjoying privileges granted subject to conditions by the other, most public service corporations would be able to escape either state or federal taxation. One had as well argue that a corporation enjoying the right of eminent do-

main under grant from the state is an agency of the state, and therefore not taxable by the federal government, as that [fol. 58] a corporation holding a license to build a dam in a navigable stream is for that reason an agency of the federal government and not taxable by the state. It is unthinkable that corporations of a state, carrying on private business protected by its laws, should escape the payment of excise taxes imposed upon such business, merely because they enjoy a license from the federal government which authorizes them to use the navigable streams of the state.

If this were an attempt to tax the license granted by the federal government, to discriminate in taxation against companies holding a federal license, or to tax a structure erected in aid of navigation, a different question would, of course, be presented; but nothing of the sort is involved in the case. We have simply the taxation of the private business done by the company which falls upon it in the same manner as upon other companies engaged in like business whether they are licensed to make use of the navigable streams of the state or not. See 6 R. C. L. 105-107; Thompson v. Pacific Railroad, 9 Wall. 579; Henderson Bridge Co. v. Kentucky, 166 U. S. 150, 154; Baltimore Shipbuilding Co. v. Baltimore, 195 U. S. 375; Gromer v. Standard Dredging Co., 224 U. S. 362; Susquehanna Power Co. v. State of Maryland, supra, — U. S. —, 51 Sup. Ct. 434. In the case last cited the Supreme Court, speaking through Mr. Justice Stone, laid down the principles which we think applicable here as follows:

"Assuming, for present purposes, that the license of the Power Commission is a federal instrumentality, immune from taxation or other direct interference by the state, it does not follow that the property appellant uses in its power project is clothed with that immunity. The exemption of an instrumentality of one government from taxation by the other must be given such a practical construction as will not unduly impair the taxing power of the one or the appropriate exercise of its functions by the other. Metcalf & Eddy v. Mitchell, 269 U. S. 514, 523, 524, 46 S. Ct. 172, 70 L. Ed. 384. [fol. 59] "With that end in view, the distinction has long been taken between a privilege or franchise granted by the government to a private corporation in order to effect some governmental purpose, and the property employed by the grantee in the exercise of the privilege, but for private

business advantage. The distinction was pointed out by Chief Justice Marshall in McCulloch v. Maryland, 4 Wheat. 316, 436, 4 L. Ed. 579, and in Osborn v. Bank, 9 Wheat. 738, 867, 6 L. Ed. 204; see Union Pac. Railroad Co. v. Peniston, 18 Wall. 5, 34-37, 21 L. Ed. 787. It has been followed without departure, and property so owned and used has uniformly been held to be subject to state taxation."

Complainants attempt to distinguish the Susquehanna Power case on the ground that the tax there involved was a tax on property and not an excise tax on business. We think, however, that this is a distinction without a difference. An excise tax on production or sales is in effect a tax on the property produced or sold. Kehrer v. Stewart, 197 U. S. 60; Welton v. Missouri, 91 U. S. 275. And if the state may tax the property of the company used in the production or sale of electric current, there is no reason why it may not tax the current itself or, what is the same thing, its production and sale; for one tax is as much a burden upon what is said to be an agency of the government as the other. Mr. Justice Stone says, in the Susquehanna case, "the distinction has long been taken between a privilege or franchise granted by the government to a private corporation in order to effect some governmental purpose, and the property employed by the grantee in the exercise of the privilege, but for private business advantage"; and the same distinction in principle exists here between the privilege or franchise granted by the government, i. e: the right to erect a dam in a navigable stream, and the business carried on by the grantee for private advantage, i. e. the production and sale of electric current.

[fol. 60] A point raised by the pleadings, but not stressed in the briefs, is that because of the franchise and income taxes already imposed by the state of South Carolina upon complainants, the tax in question violates the contract clause of the Constitution of the United States (Art. 1 sec. 10) and section 8 of Article 1 of the Constitution of South Carolina. It is clear, however, that the taxing power of the state was not exhausted by the imposition of the taxes referred to; and the taxing of the business of complainants by the act here in question impaired the obligation of no contract existing between the state and complainants. See Citizens Savings Bank v. Owensboro, 173 U. S. 636, and cases there cited.

For the reasons stated, we think that the interlocutory injunction prayed for must be denied. We have been impressed with the earnest argument of counsel, who point to the heavy taxes already required of them, and complain that the statute here will add a grievous burden to their load. This, however, is a matter for the Legislature of the state and not for us. We can grant relief from a taxing statute only when it offends some constitutional provision; and, for the reasons stated, we cannot say that the statute here under consideration so offends.

Interlocutory Injunction Denied.

We concur.

John J. Parker, U. S. Circuit Judge, 4th Judicial Circuit. Elliott Northcott, U. S. Circuit Judge, 4th Judicial Circuit. Ernest F. Cochran, U. S. District Judge, Eastern District S. C.

[fol. 61] IN UNITED STATES DISTRICT COURT

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed Sept. 7, 1931

In the above entitled cause the Court, after considering the pleadings and affidavits treated as evidence by stipulation of counsel, and hearing arguments of counsel on motion for interlocutory injunction, finds the followings facts:

1. That complainant is a corporation duly created and existing under and by virtue of the laws of the state of South Carolina.

2. That defendants Walter G. Query, J. P. Derham and Frank C. Robinson are citizens and residents of the state of South Carolina and are members of the Tax Commission of said State.

3. That the amount in controversy in the suit, exclusive of interest and costs, exceeds the sum or value of $3,000.00.

4. That the Legislature of South Carolina, at its session for the year 1931, enacted a revenue statute, approved the 9th day of May 1931 and entitled "An Act to Raise Revenue for the Support of the State Government by the Imposition

of an Excise Tax upon Electric Power Generated and Sold within This State", which statute is set forth in full as an exhibit*s* to the bill of complaint; and that this suit is instituted by complainant to enjoin the defendants as members of the Tax Commission of the state of South Carolina from enforcing against it the provisions of said act and from collecting from it the taxes therein imposed, on the ground that said act violates certain provisions of the Constitution of the United States and certain provisions of the Constitution of the State of South Carolina.

5. That if the said tax were unconstitutional, as alleged, [fol. 62] complainant would be without an adequate remedy at law for the reason that the act requires that controverted taxes due under the act must be paid monthly and, if paid under protest, suit for recovery of same must be instituted not later than thirty days thereafter, so that a multiplicity of suits would necessarily result were complainant to attempt to pay the taxes imposed by the act and recover same in an action at law.

6. That complainant is engaged in the generation of electric current by means of water power and steam within the state of South Carolina, a part of which is used by it in operating a street railway system in the City of Columbia and a part of which it sells for lighting, power and other purposes, and the tax which complainant will be required to pay upon the electricity which it generates will be approximately $122,000 for the calendar year 1931.

7. That the complainant does not bring electric current into South Carolina from outside the State and pays no tax upon the sale of electric current, being taxed upon production only and expressly exempted by the act from the payment of tax on sales because of having paid the production tax.

8. That the state of South Carolina does not impose a tax upon gas companies nor upon companies generating electric current by the use of oil*s* or combustion engines, although current sold by such companies would be subject to the sales tax imposed by subsection 3 of section 1 of the statute aforesaid; that there are shown to be at least two plants in the State of South Carolina producing electric current by the use of internal combustion engines, but these

plants are shown to be small and the business done by them to be comparatively insignificant.

9. That there are a number of industrial plants in the state of South Carolina manufacturing and generating power for the use of themselves and their employees, and there are a number of municipalities in the state of South Carolina generating electricity for the use of their customers.

[fol. 63] 10. That electricity is brought into South Carolina from other states and sold and the current so sold is subjected to the sales tax imposed by subsection (c) of section 1 of the act, whereas electric current generated within the state upon which the generation tax has been paid is not subject to such sales tax.

Conclusions of Law

Upon the foregoing findings of fact, the Court concludes as a matter of law:

1. That the statute does not deny to complainant due process of law or the equal protection of the laws in violation of the Constitution of the United States because gas companies are not taxed nor because the tax is not imposed upon the production of electricity by the use of oil or internal combustion engines.

2. That the statute does not deny to complainant due process of law or the equal protection of the laws because it exempts from the tax industrial plants generating power for their own use or the use of their employees, and municipalities generating power for the use of their customers.

3. That the statute does not deny to complainant the equal protection of the laws because it exempts from the sales tax electric current upon which the generation tax has already been paid.

4. That the statute does not deprive complainant of property without due process of law in failing to provide means for determining the tax on electric current brought from without and sold within the state, as complainant is required to pay tax only upon the generation of electricity and not upon the sale thereof, and is not concerned with the tax levied on sales of electric current.

5. That the statute does not deprive complainant of property without due process of law because of the provision that the revenue produced for the year 1931 shall reduce the 1931 property levy for state purposes to the full amount raised under the statute.

6. That the statute does not violate section 4 of article 10 of the Constitution of South Carolina in that it exempts municipalities from the terms of the act.

[fol. 64] 7. That the statute does not violate section 1 of article 10 of the Constitution of South Carolina in exempting from the payment of the sales tax current upon which the generation tax has already been paid.

8. That the statute does not violate section 3 of article 10 of the Constitution of South Carolina in providing that the revenue produced under the act for the year 1931 shall reduce the 1931 property levy by the full amount raised under the terms of the act.

9. That the statute, by imposing the tax in question, does not violate the Commerce Clause of the Constitution, nor article 1, section 8, of the Constitution of South Carolina.

10. That the statute in question is valid and violates no provision of the Constitution of the United States or of the Constitution of South Carolina.

11. That complainant is not entitled to the interlocutory injunction prayed.

This the 7th day of September, 1931.

John J. Parker, United States Circuit Judge, Fourth Judicial Circuit. Elliott Northcott, United States Circuit Judge, Fourth Judicial Circuit. Ernest F. Cochran, United States District Judge, Eastern District of South Carolina.

[fol. 65] IN UNITED STATES DISTRICT COURT

BROAD RIVER POWER COMPANY, Complainant,

versus

WALTER G. QUERY, J. P. DERHAM, and FRANK C. ROBINSON, as Members of and Constituting the South Carolina Tax Commission, Defendants

DECREE DENYING INTERLOCUTORY INJUNCTION—Filed Sept. 7, 1931

This cause coming on to be heard on application of complainant for interlocutory injunction before the undersigned, constituting a court of three judges convened pursuant to section 266 of the Judicial Code, and being heard upon the bill, answer, affidavits and arguments of counsel; and the Court having made and filed its findings of fact and conclusions of law as required by the equity rule of the Supreme Court, and being of opinion for the reasons therein stated, and more fully set forth in the written opinion filed herewith, that complainant is not entitled to the interlocutory injunction prayed:

Now, therefore, it is Ordered and Decreed that the interlocutory injunction prayed for be, and the same is hereby, denied; and it is further Ordered that the temporary restraining order heretofore granted be dissolved, provided, however, that the said temporary restraining order shall be continued in force for thirty days from this date for the purpose of preserving the status quo until the complainant shall have had opportunity to determine whether it will appeal to the Supreme Court and to take such steps as may be necessary and proper for the preservation of its rights pending appeal.

And this cause is retained for further orders.

This the 7th day of September, 1931.

John J. Parker, United States Circuit Judge, Fourth Judicial Circuit. Elliott Northcott, United States Circuit Judge, Fourth Judicial Circuit. Ernest F. Cochran, United States District Judge, Eastern Dist. South Carolina.

[fol. 66] IN UNITED STATES DISTRICT COURT

STIPULATION AND AGREEMENT OF COUNSEL AS TO RECORD—Filed May 16, 1932

For the purpose of a final hearing by the three judge Statutory Court it is stipulated and agreed between counsel for the parties the court shall consider as testimony before it on such final hearing the entire record in this cause which was before the court at the Asheville hearing on application for interlocutory injunction.

It is further stipulated and agreed by and between counsel for the parties hereto that the "Findings of Fact" herein filed 7th September, 1931, and appearing at page 48 of the printed transcript of record hereto attached shall, subject to the court's approval be modified in the following particulars:

Amend findings of fact numbered six by changing the figure "85,000" to the figure "122,000", and by striking out "per year or more" and inserting in lieu thereof "for the calendar year 1931."

If all the above amendments are not fully sustained by the record it is nevertheless agreed by counsel that such amendments are facts and may be considered by the court as such and as if testified to in open court without contradiction.

Agreed to this 21 day of April, A. D. 1932.

J. Fraser Lyon, Attorney for Defendants. W. C. McLain, Attorney for Complainant.

Dated 21st April, A. D. 1932.

[fol. 67] IN UNITED STATES DISTRICT COURT

STIPULATION AND AGREEMENT AS TO HEARINGS—Filed May 16, 1932

It is stipulated and agreed by and between Counsel for the parties hereto:

1. That the final hearings on applications for permanent injunctions shall be heard by the three judge Statutory Court in the City of Asheville, North Carolina, on the 13th

day of June 1932 or at such other time as the Court may be called together for said hearing.

2. That said final hearings shall be upon an agreed statement of facts incorporated in stipulations and agreements of counsel dated 21st April 1932 and May 9th 1932.

3. That the Court in its final orders make provision for time for any party to perfect an appeal to the United States Supreme Court upon giving supercedeas bond in an amount to be agreed upon by counsel for the parties.

This stipulation is not intended to preclude the Court fro*n* finding such other and additional facts as may be revealed by the record herein.

J. Fraser Lyon, Attorney for Defendants. Hagood, Rivers & Young, M. Rutledge Rivers, Attorney-for South Carolina Power Company. W. C. McLain, Attorney for Broad River Power Company. W. C. McLain, Attorney for Lexington Water Power Company.

Dated May 11th, A. D. 1932.

[fol. 68] IN UNITED STATES DISTRICT COURT

ORDER CALLING TOGETHER THREE-JUDGE COURT—Filed May 16, 1932

The plaintiff brought this suit for a permanent injunction. An application was made for an interlocutory injunction, which was pressed to a hearing and decision before three Judges under the provisions of Section 266 Judicial Code (U. S. Code, Title 28, Section 380). The case now comes up for final hearing on the merits, which must, under said provisions of law, be heard before three Judges. The counsel representing all parties have stipulated that the hearing on the final hearing on the merits be at Asheville, N. C. It is therefore

Ordered that Hon. John J. Parker, U. S. Circuit Judge, and Hon. Elliot Northcott, U. S. Circuit Judge, be and they are hereby called to the assistance of the undersigned, Hon. Ernest F. Cochran, District Judge; and the court as thus

constituted be the court to hear and determine the said suit for a permanent injunction. It is further

Ordered that the final hearing on the merits for a permanent injunction herein be and the same is hereby set down for hearing before said three judges as required by law at Asheville, N. C. on Monday, June 13, 1932, at ten o'clock A. M. It is further

Ordered that the Clerk of this Court or one of his deputies do attend this hearing at said time and place, and bring with him the entire record in this case.

Ernest F. Cochran, U. S. District Judge.

May 16th, 1932.

[fol. 69] In United States District Court

Opinion—Filed July 21, 1932

Parker, Circuit Judge:

These cases were before us some months ago on applications for interlocutory injunctions; and the legal questions involved were carefully considered at that time. See 52 Fed. (2d) 515. These orders denying interlocutory injunctions were affirmed on appeal to the Supreme Court. — U. S. —, 52 Sup. Ct. Rep. 494. On final hearing the facts have been stipulated; and, in our opinion, they are not materially different from the facts as found on the applications for interlocutory injunctions. No extended discussion of the case is, therefore, required. For the reasons stated in our original opinion, we think that we should deny the injunctions prayed and dismiss the bills. So far as the questions raised under the Commerce Clause of the Constitution are concerned, we are fortified in our conclusion by the recent decision of the Supreme Court in the case of Utah Power & Light Co. v. Pfost — U. S. —, 52 Sup. Ct. Rep. 548.

We desire to notice one question raised on the final hearing of the South Carolina Power Company's case which was not raised on the application for interlocutory injunction. This question relates to the tax on so much of its current as is sold to the Seminole, Aiken, Langley and Graniteville Mfg. Co. mil-s and to the towns of McCormick

and Bamberg. With respect to the current sold to the mills, it appears that this is supplied to them by wires connecting with the wires of the power company carrying high voltage current from its Stevens Creek plant. Wires from the high tension wires run to transformers owned by the mills; and the current is there stepped down and measured on the low voltage side of the transformers. In the case of the town of McCormick, a high voltage transmission line delivers current to it from the Stevens Creek plant. Before reaching McCormick, however, this line delivers current, with voltage reduced through transformers, [fol. 70] to consumers in four municipalities. The town of McCormick receives the current at the high voltage, reduces it, and sells it to consumers. In the case of the town of Bamberg, the voltage of the current is reduced by the company, but the current is sold by the town to the ultimate consumers.

We do not think that any of these special circumstances bring the current sold under the protection of the Commerce Clause of the Constitution. The power company is engaged in selling current locally within the state of South Carolina; and the tax complained of is imposed on sales in the course of this business. Of course, the state may not tax the interstate transmission or sale of electricity; but after the interstate journey of the current is ended and it becomes mingled with the current which the power company distributes and sells within the state, its sale unquestionably becomes subject to taxation by the state. The power company has a great system of lines within the state of South Carolina for the transmission and sale of electric current; and, when the current brought in from without the state reaches the lines used for this purpose, its interstate character is ended and it becomes subject to tax in the same manner as current produced within the state.

The bill of complaint of the power company shows that there is an inextricable intermingling on its transmission lines of the current brought from without and that produced within the state. In one place in the bill it is said: "The electrical energy brought from the state of Georgia and the electrical energy generated in complainant's steam plant in Charleston are fed into the interconnected transmission system of the complainant, the meeting point of

these two sources of supply being indefinite and changing from instant to instant." And at another place it is said: "The demands of complainant's various customers in South Carolina occur on various transmission and distribution [fol. 71] lines in such state, and these demands are supplied from the generating plants at Charleston, South Carolina, and Stevens Creek, Georgia (except that in the case of deficiency of flow in the Savannah River this demand to the extent of such deficiency is supplied from the system of the Georgia Power Company). There is thus created a continuing, combined demand on those two generating plants located in different states which exists throughout the entire interstate system." Certainly, if these allegations are accepted, there can be no question as to the power of the state to tax the local sales of current made from its current carried on its local distribution lines, which is the joint product of manufacture within and without the state; for such current has thus become mingled, as it were, with the mass of property within the state, and as such is subject to state taxation. Askern v. Continental Oil Co., 252 U. S. 444; General Oil Co. v. Crain 209 U. S. 211.

It is said, however, that notwithstanding the allegations of the bill, we should find that the current supplied to the town of McCormick is carried by a line not connected with any producing plant in South Carolina, and is therefore not mingled with any current produced within the state, and that the mills, while on a line connected with the producing plant at Charleston, S. C., are not reached by the current produced at that point. Even if this be assumed, we do not think that the position of the power company is helped. The fact remains that the lines which supply the town of McCormick and the mills in question are lines maintained for the local distribution and sale of electric current; and when current brought in from another state is placed on these lines for local distribution and sale, it loses its interstate character. And it makes no difference that delivery is made to the local customer at high voltage. [fol. 72] The quantity of current is measured not in volts but in amperes; and when current is drawn off the lines, the "original package" is broken and the amperage remaining on the lines is reduced. The line to McCormick, for instance, carries the current which the power company uses

to supply its customers in Merriwether, Modoc, Parksville and Plum Branch. The current which the lines carries is broken up for sale to these various users and the town of McCormick obtains only a part of the current carried on the line. The situation presented is not different in principle from that of a dealer who brings into the state a cargo of fertilizer in bulk and sells it partly at wholesale and partly at retail. No one would question the power of the state to tax the business of such dealer.

The case of State Tax Commission of Mississippi v. Interstate Natural Gas Co., — U. S. —, 52 Sup. Ct. Rep. 62, upon which the power company particularly relies, is not in point. In that case, the company upon which the tax was levied was not engaged in business in the state which proposed to levy the tax. It merely sold natural gas which it had transported from another state to a local distributing company. Here not only is the power company engaged in the business of selling electric current locally, but the current sold to all of its customers is drawn from the lines which it uses for the purpose of carrying on the business of local distribution and sale.

There is no escaping the fact that the business of the South Carolina Power Company is primarily local in character. Its system of lines is used for the distribution and sale of electricity within the state of South Carolina. As stated above, a large part of the electric current distributed and sold by it is produced within the state, and the part brought from without the state is handled over the local distribution system and is distributed and sold locally. As [fol. 73] said by the Supreme Court in Missouri v. Kansas Gas Co., 265 U. S. 298, 309, with respect to the distribution and sale of natural gas:

"The business of supplying, on demand, local consumers is a local business, even though the gas be brought from another State and drawn for distribution directly from interstate mains; and this is so whether the local distribution be made by the transporting company or by independent distributing companies. In such case the local interest is paramount, and the interfe*n*ence with interstate commerce, if any, indirect and of minor importance."

The case cannot be distinguished in principle, we think, from East Ohio Gas Co. v. Tax Com. of Ohio, 283 U. S. 465.

The tax complained of is levied not on sales made in carrying on commerce between the states, but on sales made in the operation of a local distribution system. It is immaterial that a part of the electrical energy used by such system is obtained from without the state; and it is likewise immaterial that distribution is made to some customers at a high voltage.

In all three cases, the prayers for permanent injunction will be denied and the bills will be dismissed.

Injunction denied and bills dismissed.

We concur.

John J. Parker, U. S. Circuit Judge. Ernest F. Cochran, U. S. District Judge.

See Judge Northcott's Concurrence.

[fol. 74] IN UNITED STATES DISTRICT COURT

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed July 21, 1932

In the above entitled cause the Court, after considering the pleadings, affidavits and stipulation of the parties as to the facts, and hearing arguments of counsel, finds the following facts:

1. That complainant is a corporation duly created and existing under and by virtue of the laws of the state of South Carolina.

2. That defendants Walter G. Query, J. P. Derham and Frank C. Robinson are citizens and residents of the State of South Carolina and are members of the Tax Commission of said State.

3. That the amount in controversy in the suit, exclusive of interest and costs, exceeds the sum or value of $3,000.00.

4. That the Legislature of South Carolina, at its session for the year 1931, enacted a revenue statute, approved the 9th day of May, 1931, and entitled "An Act to Raise Revenue for the Support of the State Government by the Imposition of an Excise Tax upon Electric Power Generated and Sold Within This State," which statute is set forth in full as an exhibit to the bill of complaint; and that this suit is in-

stituted by complainant to enjoin the defendants as members of the Tax Commission of the state of South Carolina [fol. 75] from enforcing against it the provisions of said act and from collecting from it the taxes therein imposed, on the ground that said act violates certain provisions of the Constitution of the United States and certain provisions of the Constitution of the State of South Carolina.

5. That if the said tax were unconstitutional, as alleged, complainant would be without an adequate remedy at law for the reason that the act requires that controverted taxes due under the act must be paid monthly and, if paid under protest, suit for recovery of same must be instituted not later than thirty days thereafter, so that a multiplicity of suits would necessarily result were complainant to attempt to pay the taxes imposed by the act and recover same in an action at law.

6. That complainant is engaged in the generation of electric current by means of water power and steam within the state of South Carolina, a part of which is used by it in operating a street railway system in the City of Columbia and a part of which it sells for lighting, power and other purposes, and the tax which complainant will be required to pay upon the electricity which it generates will be approximately $122,000 for the calendar year 1931.

7. That the complainant does not bring electric current into South Carolina from outside the State and pays no tax upon the sale of electric current, being taxed upon production only and expressly exempted by the act from the payment of tax on sales because of having paid the production tax.

8. That the state of South Carolina does not impose a tax upon gas companies nor upon companies generating electric current by the use of oils or combustion engines, although current sold by such companies would be subject to the sales tax imposed by subsection 3 of section 1 of the statute aforesaid; that there are shown to be at least two plants in the [fol. 76] State of South Carolina producing electric current by the use of internal combustion engines, but these plants are shown to be small and the business done by them to be comparatively insignificant.

9. That there are a number of industrial plants in the state of South Carolina manufacturing and generating power for the use of themselves and their employees, and there are a number of municipalities in the state of South Carolina generating electricity for the use of their customers.

10. That electricity is brought into South Carolina from other states and sold and the current so sold is subjected to the sales tax imposed by subsection (c) of section 1 of the act, whereas electric current generated within the state upon which the generation tax has been paid is not subject to such sales tax.

Conclusions of Law

Upon the foregoing findings of fact, the Court concludes as a matter of law:

1. That the statute does not deny to complainant due process of law or the equal protection of the laws in violation of the Constitution of the United States because gas companies are not taxed nor because the tax is not imposed upon the production of electricity by the use of oil or internal combustion engines.

2. That the statute does not deny to complainant due process of law or the equal protection of the laws because it exempts from the tax industrial plants generating power for their own use or the use of their employees, and municipalities generating power for the use of their customers.

3. That the statute does not deny to complainant the equal protection of the laws because it exempts from the sales tax electric current upon which the generation tax has already been paid.

[fol. 77] 4. That the statute does not deprive complainant of property without due process of law in failing to provide means for determining the tax on electric current brought from without and sold within the state, as complainant is required to pay tax only upon the generation of electricity and not upon the sale thereof, and is not concerned with the tax levied on sales of electric current.

5. That the statute does not deprive complainant of property without due process of law because of the provision

that the revenue produced for the year 1931 shall reduce the 1931 property levy for state purposes to the full amount raised under the statute.

6. That the statute does not violate section 4 of article 10 of the Constitution of South Carolina in that it exempts municipalities from the terms of the act.

7. That the statute does not violate section 1 of article 10 of the Constitution of South Carolina in exempting from the payment of the sales tax current upon which the generation tax has already been paid.

8. That the statute does not violate section 3 of article 10 of the Constitution of South Carolina in providing that the revenue produced under the act for the year 1931 shall reduce the 1931 property levy by the full amount raised under the terms of the act.

9. That the statute, by imposing the tax in question, does not violate the Commerce Clause of the Constitution, nor article 1, section 8, of the Constitution of South Carolina.

10. That the statute in question is valid and violates no provision of the Constitution of the United States or of the Constitution of South Carolina.

11. That the bill of complaint herein, should be dismissed for want of equity.

[fol. 78] This the 21st day of July 1932.

(Signed) John J. Parker, U. S. Circuit Judge, Fourth Circuit. (Signed) Elliott Northcott, U. S. Circuit Judge, Fourth Circuit. (Signed) Ernest F. Cochran, U. S. District Judge.

[fol. 79] In United States District Court for the Eastern District of South Carolina

Broad River Power Company, Complainant,

v.

Walter G. Query, J. P. Derham, and Frank C. Robinson, as Members of and Constituting the South Carolina Tax Commission, Defendants

Final Decree Dismissing Bill—Filed July 21, 1932

This cause coming on to be heard before the undersigned, constituting a court of three judges convened pursuant to

Section 266 of the Judicial Code, and being heard upon the bill, answer, affidavits, stipulation of the parties as to the facts and arguments of counsel; and the court having made and filed its findings of fact and conclusions of law as required by the Equity Rule of the Supreme Court; thereupon, upon consideration thereof.

It is ordered, adjudged, and decreed that the bill of complaint herein be, and the same hereby is, dismissed for want of equity, with costs to the defendants. This 21st day of July, 1932.

(Signed) John J. Parker, U. S. Circuit Judge, Fourth Circuit. (Signed) Elliott Northcott, U. S. Circuit Judge, Fourth Circuit. (Signed) Ernest F. Cochran, U. S. District Judge.

[fol. 80] IN UNITED STATES DISTRICT

RESTRAINING ORDER PENDING APPEAL—Filed July 21, 1932

Whereas, in the above entitled cause a bill of complaint for a perpetual injunction has been filed and the cause has heretofore been heard by a court of three judges, composed of the undersigned, convened pursuant to the provisions of Section 266 of the Judicial Code and a final decree has been entered denying such application for an injunction and dismissing said bill of complaint; and

Whereas, the said Complainant has obtained an order allowing an appeal from said decree, and it appearing from the papers on file in this cause that there is danger of immediate and irreparable loss or damage to the Complainant unless the Defendants are, pending a hearing and determination of said appeal, restrained as herein set forth;

Now, therefore, it is ordered that the defendants, and each of them, their successors in office and their servants, agents, attorneys and counsellors be, and they hereby are, pending the hearing and determination of the appeal from the final decree herein, and until the further order of this Court, enjoined and restrained from enforcing, or taking any steps to enforce, directly or indirectly, against the Complainant above named, the terms and provisions of an Act of the General Assembly of South Carolina, approved May 9, 1931, [fol. 81] entitled "An act to raise revenue for the support

of the State Government by the imposition of an excise tax upon electric power generated and sold within this State".

Further ordered, that the Complainant herein give a bond in the sum of $10,000.00 conditioned to pay such damages as the Defendants may suffer if said Complainant shall fail to prosecute its appeal to effect and if it fails to make its plea good, which bond shall be with surety or sureties approved by the United States District Judge for the Eastern District of South Carolina and shall be filed within ten days from the date hereof.

(Signed) John J. Parker, U. S. Circuit Judge, Fourth Circuit. (Signed) Elliott Northcott, U. S. Circuit Judge, Fourth Circuit. (Signed) Ernest F. Cochran, United States District Judge.

Dated July 21st, 1932.

I consent to the issuance of the foregoing order upon the execution of bond in the amount therein set forth, and consent that the order may be signed by the members of the statutory court separately and without assembling.

(Signed) J. Fraser Lyon, Solicitor for Defendants.

[fols. 82 & 83] Bond on restraining order for $10,000, approved and filed August 3, 1932, omitted in printing.

[fol. 84] IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL, ASSIGNMENT OF ERRORS, AND PRAYER FOR REVERSAL—Filed July 21, 1932

Considering itself aggrieved by the decision and final decree of the Court of three judges convened in the above entitled case pursuant to Section 266 of the Judicial Code, the Complainant therein, Broad River Power Company, hereby prays that an appeal be allowed to the Supreme Court of the United States herein, and for an order fixing the amount of the bond thereon.

Assignment of Errors

And the said Complainant assigns the following errors in the records and proceedings is said case:

1. The Court erred in holding that the South Carolina Statute of May 9, 1931 entitled "An act to raise revenue

for the support of the State Government by the imposition of an excise tax upon electric power generated and sold within this State'' does not deny to Complainant due process of law or the equal protection of the laws in violation of the Constitution of the United States because the tax is not imposed upon the production of electricity by the use of oil or internal combustion engines.

2. The Court erred in holding that the South Carolina Statute of May 9, 1931 entitled ''An act to raise revenue for the support of the State Government by the imposition [fol. 85] of an excise tax upon electric power generated and sold within this State'' does not deny to Complainant due process of law or the equal protection of the laws because it exempts from the tax industrial plants generating power for their own use or the use of their employees, and municipalities generating power for the use of their customers.

3. The Court erred in holding that the South Carolina Statute of May 9, 1931 entitled ''An act to raise revenue for the support of the State Government by the imposition of an excise tax upon electric power generated and sold within this State'' does not violate Section 1 of Article 10 of the Constitution of South Carolina in excepting from the payment of the sales tax current upon which the generation tax has already been paid.

4. The Court erred in holding that the South Carolina Statute of May 9, 1931 entitled ''An act to raise revenue for the support of the State Government by the imposition of an excise tax upon electric power generated and sold within this State'' is valid and violates no provision of the Constitution of the United States or of the Constitution of South Carolina.

5. The Court erred in holding that the Complainant is not entitled to the injunction prayed.

6. The Statute of the State of South Carolina enacted May 9, 1931 entitled ''An act to raise revenue for the support of the State Government by the imposition of an excise tax upon electric power generated and sold within this State'' is in contravention of the Constitution of the United States, especially the due process of law and equal protection of the laws clauses of the Fourteenth Amendment to said Constitution.

[fol. 86] Prayer for Reversal

For which errors the Complainant, Broad River Power Company, prays that the said decree of the District Court of the United States for the Eastern District of South Carolina dated July 21st, 1932, in the above entitled cause be reversed and a decree rendered in favor of the said Complainant, and for costs.

Geo. M. LePine, W. C. McLain, Solicitors for Complainant. Elliot, McLain, Wardlaw & Elliot, Columbia, South Carolina; Travis, Paxson, Wallace & Philbin, 61 Broadway, New York, N. Y., Counsel.

In United States District Court

Order Allowing Appeal—Filed July 21, 1932

And now, to wit, on 21st July, 1932, it is ordered that the appeal be allowed as prayed for upon the filing of bond in the sum of $250.00, as required by Rule of the District Court.

Ernest F. Cochran, U. S. District Judge.

Bond on Appeal, $250.00 cash deposited by appellant.

[fol. 87] In United States District Court

Order Enlarging Time to File Transcript of Record—Filed August 24, 1932

For good cause shown, it is ordered that the time for filing the transcript of record on appeal in the above entitled cause with the Clerk of the Supreme Court of the United States, be enlarged from the 25th day of August, 1932, to the 24th day of September, 1932.

Ernest F. Cochran, U. S. District Judge.

August 24th, 1932.

[fol. 88] IN UNITED STATES DISTRICT COURT

STIPULATION AS TO CONTENTS OF TRANSCRIPT OF RECORD—
Filed September 15, 1932

Bill of Complaint.
Exhibit "A", Revenue Act.
Application for temporary Restraining Order and Interlocutory Injunction.
Rule to Show Cause.
Answer.
Affidavit of W. L. Yoder.
Affidavit of Norman H. Coit.
Opinion.
Findings of Fact and Conclusions of Law.
Decree Denying Interlocutory Injunction.
Stipulation and Agreement of Counsel.
Order calling together three Judge Court for June 13, 1932.
Opinion.
Findings of Fact and Conclusions of Law.
Final Decree Dismissing Bill.
Restraining Order Pending Appeal.
Bond for Restraining Order Pending Appeal.
Petition for Appeal.
Assignment of Errors.
Prayer for Reversal.
Order allowing Appeal.
Bond for Costs on Appeal $250.00 cash deposited.
Order Extending time to file Transcript of Record dated August 24, 1932.
Stipulation as to Contents of Transcript of Record.
Citation.
Service of Citation.
Clerk's Certificate.

Geo. M. LePine, W. C. McLain, Attorneys for Complainant. J. Fraser Lyon, Attorney for Defendants.

Dated this 14th day of September, 1932.

[fol. 89] Citation, in usual form, showing service on J. Fraser Lyon, filed July 26, 1932, omitted in printing.

[fol. 90] Clerk's certificate to foregoing transcript omitted in printing.

[fols. 91 & 92] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed Oct. 6, 1932

Comes now the Appellant and adopts its assignments of error as its statement of the points to be relied upon and represents that the whole of the record, as filed, is necessary for the consideration of the case.

Geo. M. LePine, Counsel for Appellant.

Due service of the foregoing is hereby admitted.

J. Fraser Lyon, Counsel for Appellees.

[fol. 93] [File endorsement omitted.]

Endorsed on cover: File No. 37,087. E. South Carolina D. C. U. S. Term No. 390. Broad River Power Company, appellant, vs. Walter G. Query, J. P. Derham, and Frank C. Robinson, as members of and constituting the South Carolina Tax Commission. Filed September 22, 1932. File No. 37,087.

CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 391

LEXINGTON WATER POWER COMPANY,
APPELLANT,

vs.

WALTER G. QUERY, J. P. DERHAM, AND FRANK C. ROBINSON, AS MEMBERS OF AND CONSTITUTING THE SOUTH CAROLINA TAX COMMISSION

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

FILED SEPTEMBER 22, 1932

(37,088)

(37,088)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 391

LEXINGTON WATER POWER COMPANY,
APPELLANT,

vs.

WALTER G. QUERY, J. P. DERHAM, AND FRANK C. ROBINSON, AS MEMBERS OF AND CONSTITUTING THE SOUTH CAROLINA TAX COMMISSION

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

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[fols. a & 1] [Caption omitted]

[fol. 2]

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

In Equity

LEXINGTON WATER POWER COMPANY, Plaintiff,

v.

WALTER G. QUERY, J. P. DERHAM, and FRANK C. ROBINSON, as Members of and Constituting the South Carolina Tax Commission, Defendants

BILL OF COMPLAINT—Filed June 6, 1931

To the Judge of the District Court of the United States for the Eastern District of South Carolina:

The plaintiff, Lexington Water Power Company, presents this its Bill of Complaint against the defendants, [fol. 3] Walter G. Query, J. P. Derham and Frank C. Robinson, as members of and constituting the South Carolina Tax Commission, and for a cause of action says:

First. That the plaintiff Lexington Water Power Company is a corporation duly organized and existing under and by virtue of the laws of the State of South Carolina, and having its principal office and place of business in said State, and is a citizen and resident of said State.

Second. That the defendant Walter G. Query is a citizen of the State of South Carolina and a resident of the County of Spartanburg in the Western District of South Carolina; the defendant J. P. Derham is a citizen of the State of South Carolina and a resident of the County of Horry in the Eastern District of South Carolina; that the defendant Frank C. Robinson is a citizen of the State of South Carolina and a resident of the County of Richland in the Eastern District of South Carolina; that the said defendants Walter G. Query, J. P. Derham and Frank C. Robinson are all

members of and constitute the South Carolina Tax Commission which is an administrative body created and existing under and by virtue of the Constitution and laws of the State of South Carolina with offices in the City of Columbia, in the Eastern District of South Carolina.

Third. That this suit involves questions arising under the Constitution and laws of the United States and of the State of South Carolina hereinafter specifically set forth, and that the amount involved exclusive of interest and costs exceeds the sum of $3,000.

That this suit is of a civil nature and attacks the validity of a certain Act of the General Assembly of the State of South Carolina approved 9th May, 1931, entitled "An Act [fol. 4] to raise revenue for the support of the State Government by the imposition of an excise tax upon electric power generated and sold within this State," hereinafter more particularly referred to and a copy of which is hereto attached, marked Exhibit "A" and made a part hereof, which said Act purports to impose upon this plaintiff, in addition to all other taxes of every kind now imposed by law, an excise, license, or privilege tax of five-tenths of one mill upon each kilowatt hour of electric power manufactured or generated, said tax to be paid to and collected by the South Carolina Tax Commission, which Commission is given power under the terms of said Act to enter upon the premises of this plaintiff, and to examine its instruments, books, records, etc., and to make rules and regulations pertinent to the enforcement of said Act, which shall have the full force and effect of law.

That under the terms of said Act it took effect on May 1st, 1931, and subjects this plaintiff to the payment of said tax between the 1st and 10th of June, 1931, and each month thereafter; that failure to pay said tax when due each month will subject this plaintiff according to the terms of said Act, to a penalty of twenty-five per cent. of the amount of tax found to be due, and that all taxes and penalties shall be construed to be a debt payable to the State and constitute a first lien upon all the property of this plaintiff.

That said Act further provides that if the tax imposed by the Act is paid under protest, that this plaintiff may at any time within thirty days after making such payment

under protest, but not afterwards, bring an action against the South Carolina Tax Commission in any court of competent jurisdiction for the recovery back of such tax so [fol. 5] paid under protest, with interest at the rate of four per cent., whereas plaintiff, in order to carry on its public business, is required to borrow funds from time to time and to pay interest thereon at a rate in excess of six per cent.

Fourth. That the South Carolina Tax Commission has already undertaken initial steps for the carrying into effect of said Act and unless enjoined and restrained threatens to collect a tax under said Act on all electricity generated by plaintiff.

Fifth. That the further object of this suit is that plaintiff may be relieved from the payment of the taxes imposed by said Act approved 9th May, 1931, and that the same may be declared to be illegal, null and void, in that it unlawfully infringes plaintiff's constitutional rights, and if enforced will deny to the plaintiff the equal protection of the laws, and will amount to the unlawful taking of plaintiff's property without compensation, and without due process of law, and will in fact amount, in connection with other taxes payable to the State of South Carolina, to an entire and complete confiscation of plaintiff's property without due process of law, in violation of the Constitution of the United States and of the State of South Carolina as hereinafter set forth.

Sixth. That the plaintiff, prior to the construction of its hydro-plant hereinafter described, and as a necessary prerequisite to financing the cost of the construction thereof, entered into contracts for the sale of the entire output of electricity therefrom for a term of 50 years, at a price sufficient only to pay the operating cost and a reasonable return on the investment and on the faith thereof sold to the general public securities in the amount of $17,000,000, in [fol. 6] addition to stock to the extent of several million dollars and that the imposition of the tax provided for in said statute will cause great hardship to holders of its securities. That the tax purported to be imposed by the statute hereinbefore referred to is oppressive and confiscatory and unlawfully discriminates against the plaintiff and

results in the taking of its property without compensation and without due process of law and denying the plaintiff equal protection of the laws, in violation of the provisions of the Constitution of the United States and the State of South Carolina hereinafter referred to.

Seventh. That the plaintiff is engaged in the manufacture, transmission and sale to public service companies, at wholesale only, of electrical energy, and in the conduct of its business manufactures and sells electricity generated by a hydro-electric plant, in large amounts, that its total estimated production of hydro-generated electricity for the year 1931 will amount to approximately 300,000,000 kilowatt hours, and that the taxes purported to be levied by the statute of the State of South Carolina, hereinbefore referred to, against this plaintiff for the year commencing on May 1, 1931, would amount to at least the sum of $150,000, and plaintiff avers that said Act is illegal, null and void, and should be so declared upon the ground that it violates Sections 5 and 6 of Article I of the Constitution of South Carolina, and Section 1 of Article X of the Constitution of South Carolina, and Sections 8 and 10 of Article I of the Constitution of the United States, and also the Fourteenth Amendment to the Constitution of the United States, in that the said Tax so imposed by the said Act in its practical operation and effect will deny to this plaintiff the equal protection of the laws, will take its property without [fol. 7] due process of law, will constitute a tax upon an agency and instrumentality of the United States; for the reason that inter alia the said tax is discriminatory; that it impairs the obligation of plaintiff's contract with the State of South Carolina; that it is not graduated in accordance with the provisions of the Constitution of the State of South Carolina, and that it is confiscatory of plaintiff's property, and is a direct interference with and burden upon interstate commerce.

Eighth. That all of the electricity generated by the plaintiff is generated at a water power plant owned by the plaintiff and located on the Saluda River in Lexington County, South Carolina. That said plant was constructed, and is operated, pursuant to a license duly granted by the Federal Power Commission pursuant to the provisions of the Federal Water Power Act, a copy of which license is hereto

annexed marked Exhibit B and made a part hereof. That the said license issued to this plaintiff constitutes this plaintiff an instrumentality or agency of the United States in aid of navigation, and to facilitate interstate and foreign commerce, and under the terms of said license the United States has the power to take over the said project at the end of fifty years upon payment of the net amount of money legitimately invested in said project; that it has the further right to require this plaintiff to furnish lights free of charge for use in navigation, and use property of this plaintiff in aid of navigation; that plaintiff is further required to install gauges in the Saluda River, to rate the stream and determine the flow thereof under the rules of the United States Geological Survey, and further under the provisions of said license the United States specifically retains the right to use the water in plaintiff's lake in such amounts as may be nec- [fol. 8] essary for the purposes of navigation, and plaintiff's rights to the use of said stream waters are at all times controlled by the rules and regulations prescribed by the Secretary of War in the interest of navigation and by the Federal Power Commission in the interest of flood control; that said license further provides that if the United States should desire to construct or improve navigation facilities in connection with said project the plaintiff shall convey to the United States free of cost such of its lands and rights of way and right of passage through its dam as may be required to complete such navigation facilities and furnish power free of charge to the United States for the operation of its navigation facilities; that by Article 22 of said license it is provided that after the first twenty years of operation of said project, out of the surplus earned thereafter, the plaintiff shall establish and maintain certain amortization reserves to be applied from time to time in the reduction of the net investment or cost of said project, and the amount to be paid on the taking thereof by the United States as hereinbefore alleged, for all of which reasons plaintiff alleges that it is an agency or instrumentality of the United States, and that the imposing by the State of South Carolina of an occupation, privilege or license tax such as is imposed by the Act of May 9th, 1931, is illegal, null and void, and in violation of the Constitution of the United States as an attempt to tax an agency of the United States.

Ninth. Plaintiff alleges further that on or about May 1st, 1931, pursuant to Act of the General Assembly of South Carolina a license or privilege tax amounting to three mills on its entire gross receipts for the year 1930 was paid the State of South Carolina by plaintiff, which, under the existing provisions of law, entitled it to the right to carry on its [fol. 9] business in the State of South Carolina for the year 1931, and that further this plaintiff has already incurred, under another Act of South Carolina, an obligation to pay to the State of South Carolina an additional license, excise or privilege tax amounting to approximately seven mills upon the assessed value of its real and personal property as fixed by the South Carolina Tax Commission, and that the imposition of the additional license or privilege tax provided for in the Act in question will amount to an impairment of this plaintiff's contract with the State of South Carolina in violation of Section 10 of Article I of the Constitution of the United States, and Section 8, Article I of the Constitution of South Carolina.

Tenth. That there are engaged in the business of distributing and selling electricity within the State of South Carolina a number of public service corporations which purchase a large amount of the electricity, distributed and sold by them, from other companies which generate said electricity, and that under the provisions of the statute hereinbefore referred to, said public service corporations are exempt from the payment of any tax on the electricity purchased and resold by them.

That electric energy generated by oil or combustion engines is of the same character as electricity generated by hydro-electric or steam generating plants, and that there are in operation in the State of South Carolina plants which generate electricity by oil or combustion engines, and that no tax is levied on electricity so generated by the terms and provisions of the statute hereinbefore referred to.

That the discrimination hereinbefore in this paragraph alleged denies to this plaintiff the equal protection of the [fol. 10] laws in violation of the Fourteenth Amendment to the United States Constitution and Section 5, Article I of the Constitution of South Carolina.

Eleventh. That the tax imposed by the said Act is not graduated in accordance with the provisions of Section 1

of Article X of the Constitution of South Carolina, in that the said tax is imposed without regard to the amount of business done, or to the value of the kilowatt hour generated by the several public utilities affected by the terms and provisions of said Act.

Twelfth. That the tax in question is a license tax for the privilege of doing business and is not permitted by the Constitution of the State of South Carolina, which provides that the legislature may impose "a graduated license on occupations and business," for the reason that the proposed tax in question is the third different license tax imposed upon electric power companies under existing statutes of the State of South Carolina.

Thirteenth. That the imposition of the tax in question as applied to it will amount to a confiscation of its property, and is, therefore, unreasonable, arbitrary and null and void under the provisions of the Constitution of South Carolina and of the United States hereinbefore set forth, in that the said tax will amount to approximately eight and one-third per cent of the gross revenue of this plaintiff, and the payment of such tax together with the payment of other fixed charges necessary to be paid will amount to more than the total gross revenues of this plaintiff.

Fourteenth. That the plaintiff, in the operation of its electric business, generates a large amount of electric energy which is used by it on its own premises for lighting [fol. 11] same, power purposes, and for the use of its employees who reside on premises owned by the plaintiff. That the plaintiff also uses a large amount of electricity generated by it for the purpose of maintaining voltages on transmission lines, which electricity so used by the plaintiff is used for its own purposes. That by the terms of the statute hereinbefore referred to the plaintiff is required to pay a tax on the electricity so generated by it and used for its own purposes, and supplied to its employees on its own premises, whereas other industrial plants manufacturing or generating electricity for their own use or for use upon their own premises by their operatives or employees are not required to pay a tax thereon.

That by reason of such discrimination the plaintiff is denied the equal protection of the laws guaranteed by the Constitutional provisions hereinbefore referred to.

Fifteenth. That said Tax Act violates the 14th Amendment to the Constitution of the United States and Section 5 of Article I of the South Carolina Constitution in that it denies to this plaintiff engaged in the business of generating or producing electricity and electrical energy in the State of South Carolina, the equal protection of the laws and renders it and its property liable to be taken without due process of law, all in violation of the 14th Amendment to the Constitution of the United States in that the penalties fixed for the failure to comply with any of the provisions of the Tax Act, including the making of such reports as are required by the Tax Act, and the payment of the tax imposed and levied thereunder, and for failure to open for inspection the books and records of the company, as is provided by Section 8 of the Tax Act, are so excessive as to intimidate, coerce and compel any persons coming under the Tax Act, including this plaintiff, to comply with the provisions of said Tax Act [fol. 12] without the freedom of resorting to the courts to test the validity of the provisions of said Tax Act.

Sixteenth. That the fines and penalties attendant upon a failure to pay the tax imposed by the Act in question, and the institution of a multiplicity of suits, to-wit: one every thirty days in order to comply with the provisions of the Act relating to payment of the tax under protest, effectually operate to deprive, and actually will deprive plaintiff of its property without due process of law in violation of the Constitution of South Carolina, and the Fourteenth Amendment to the Constitution of the United States.

Seventeenth. That all of the electricity generated by plaintiff at the hydro plant hereinbefore referred to is sold by it at wholesale to Carolina Power & Light Company and Duke Power Company whose systems consisting of transmission and distribution lines located in the States of South Carolina and North Carolina, constitute an interconnected intertsate electric system and are interconnected with the plant and system of the plaintiff and that energy in electrical form is generated by the plaintiff and transmitted, distributed and delivered to customers of said

Carolina Power & Light Company and Duke Power Company in the State of North Carolina. That the plaintiff is informed and believes that the larger portion of the electricity generated at the plant of the plaintiff is transmitted to and consumed by customers of said other corporations in the State of North Carolina and that the larger part of the station use in South Carolina is in conjunction with and incidental to such generation of electricity in interstate commerce.

The terms "generation" and "manufacture" as applied to energy in the electrical form are merely synonymous [fol. 13] designations applied to one aspect of the process of transferring energy from some source in nature (such as falling water) to some point where it may be usefully applied. The various electrical facilities used in said process are purely transferring devices, and the entire combined process,—electric, magnetic and mechanical,—is integral, continuous and essentially simultaneous, as electricity travels with the speed of light—186,000 miles per second.

There is a continuous electrical and electro-magnetic path between the windings in the generator and the windings in the consumer's motor (or between the generator windings and the filament in an electric lamp or the electrodes in an electro-chemical cell). The entire electric system is a device for transferring the force (as of falling water) to, and applying it at, the point where it is to be utilized. Except as, and to the extent that, energy is called for and used at the final point of utilization, the electric generator neither receives from the water wheel shaft nor delivers to the electric transmission lines any energy other than that necessary to hold the equipment under constant rotation and electric charge in instant readiness to serve.

The power being transferred at any instant along the electric circuit existing between an electric generator at one place and a receiving device at another place is calculable at any point in the circuit from the electrical pressure or voltage between wires and the magnitude and characteristics of the electric current circulating in the wires, and is commonly expressed in kilowatts.

The "kilowatt-hour", the usual unit for measuring energy in the electrical form, is a mathematical product of the power relation in the electric circuit between a genera-

tor and a receiving device, measured in kilowatts, and the duration of time over which that relation is utilized, measured in hours.

[fol. 14] In the case of plaintiff's system "electricity and electrical energy" is "generated, manufactured or produced" in its plant for use by consumers in North Carolina only if, as and when the combined demand of consumers in North Carolina causes the turbine gates in plaintiff's South Carolina generating station to open, thus permitting the energy of the falling water exerted within the turbine to be instantly transferred through the electric generator and other parts of the interstate electric system to the consumers' motors, lights or other equipment. The entire process is a continuous inseparable transfer of energy from the water, through the generators, along the transmission lines, to the consumers' points of use in North Carolina at a rate of speed of approximately 186,000 miles per second.

Each consumer's demand (or use) occurs just as and when the consumer desires, and is effected by his act of switching on lights, motors, ranges and other electrical appliances. As the demand is made, the electricity demanded is instantly, and as an immediate and direct result of said demand, generated at plaintiff's said station specifically and solely for, and in response to, that demand and use.

The meter or meters required by said Tax Act to be maintained by the plaintiff will record, and must record, expressed in terms of kilowatt hours, the mathematical product of the power relation in the electric circuit between the generators of said system in South Carolina and the receiving devices in North Carolina, measured in kilowatts, and the duration of time over which that relation is utilized, measured in hours, including, in the measurement, the energy expended in the system, to meet losses and other necessary uses incident to the delivery of energy to such receiving devices. The measurement, therefore, upon which the tax sought to be imposed by said Tax Act [fol. 15] is based, is, and will be, a direct measure of the magnitude and duration of intertsate commerce in electricity or electric energy over said system, after said commerce has commenced and during the course thereof.

The generation of electricity is not the production of a commodity or material thing; it is a part of the process

of rendering a service, and no electricity can be commercially generated or produced except as an inseparable part of the service rendered. Likewise the "Kilowatt hour" is the measure of such service and not a measure or unit of material things.

The plaintiff further avers that the defendants threaten to assess a tax against all electricity generated by the plaintiff, and that any tax levied or assessed against the electricity so generated and used in intertsate commerce is void under the provisions of the United States Constitution as a burden on interstate commerce.

The Tax Act contains no provision or means for measuring or computing separately the amount of the tax as applied to intrastate as distinguished from interstate commerce, and is therefore void in its entirety. Nor can the plaintiff withdraw from or discontinue its intrastate business.

Eighteenth. Plaintiff specifically charges and avers that the statute in question is illegal, null and void and should be set aside, annulled and temporarily and permanently enjoined upon, inter alia, the following grounds:

(1) That such statute unlawfully invades plaintiff's constitutional rights, protected by the Constitution of the United States, and particularly by Sections 8 and 10 of Article I, and the Fourteenth Amendment to the Constitution of the United States, and plaintiff sets up and claims the protection of its rights so guaranteed by the constitutional provisions aforesaid.

[fol. 16] (2) That such statute, as applied to this plaintiff, is unconstitutional and void as an attempt to levy a tax on an agency of the United States Government and as an unlawful interference with interstate commerce in violation of the United States Constitution.

(3) That the enforcement of said statute would constitute a taking of plaintiff's property without due process of law, deny to plaintiff the equal protection of the laws, take the plaintiff's property without compensation, and impair the obligation of its contract with the State of South Carolina, in violation of and in conflict with the Constitution of the United States and particularly Section 1 of Article X and the Fourteenth Amendment to the Con-

stitution of the United States, and in violation of Sections 5 and 8 of Article I of the South Carolina Constitution.

(4) That said statute is violative of Section 1 of Article 10 of the South Carolina Constitution.

Wherefore plaintiff alleges that there is no adequate redress or remedy at law available to it to protect its property and property rights from the imposition of said tax and the fines and penalties for a non-payment thereof, and that it is, therefore, necessary for plaintiff to come into a court of equity and invoke the extraordinary remedies of such courts to avoid a multiplicity of suits, excessive and vexatious litigation, and to prevent irreparable injury, loss and damage to plaintiff's property and rights, and the taking thereof in contravention of the Constitutions of the State of South Carolina and the United States.

Wherefore, the premises being considered, and being without adequate remedy at law plaintiff prays this Honorable Court to grant plaintiff a writ of subpœna directed [fol. 17] to the above-named defendants, and each and every of them, commanding them to appear in this Court and to answer (but not under oath, answer under oath being expressly waived), the averments of this complaint and for the following general and specific relief:

(1) That said Act of the General Assembly of South Carolina approved 9th May, 1931, be declared to be invalid and in violation of the Constitutional rights of this plaintiff, and null and void, for the reasons hereinbefore set out.

(2) That in view of the immediate and irreparable loss and damage which will be sustained by this plaintiff by the payment of the tax imposed by the said Act, which plaintiff says it will be unable to pay and continue to perform its public duties, and the multiplicity of suits necessary to protect its rights, plaintiff prays that the above-named defendants, and each of them, be severally and jointly perpetually enjoined from enforcing, or from taking any steps to enforce, or giving any effect to said Act of May 9th, 1931, and from attempting directly or indirectly to compel this plaintiff to comply with the terms and provisions of said Act, and from commencing any suit or proceeding against this plaintiff, or establishing any lien upon

its property, or taking steps to enforce or collect any penalties, fines or forfeitures provided or imposed under the said Act in question, or any other law of the State of South Carolina, by reason of the omission or refusal of this plaintiff to comply with the terms of said Act of 9th May, 1931.

(3) Plaintiff further prays that upon a hearing for a preliminary injunction being had, a preliminary order of injunction of like character issue, and that such injunction pendente lite be granted against each and all of said defendants, enjoining and restraining them until final decree in [fol. 18] all of the respects as to which a perpetual injunction is sought in the foregoing prayer; and that upon final hearing in this cause, this Honorable Court perpetually enjoin the collection of the taxes imposed by said Act of 9th May, 1931, and any effort or attempt upon the part of any or all of the defendants to enforce the same, and to make permanent by injunction the relief hereinbefore prayed, and that this Court declare the said Act to be illegal, null and void, upon the grounds hereinbefore set forth.

(4) That, in any event, an injunction be granted, as hereinbefore prayed, restraining and enjoining the collection of any and all taxes imposed by said Act in question, or any attempt on the part of any of said defendants to enforce a compliance with said Act, or to impose any fines or penalties for the violation or disregard thereof, pending the final decision and order of this Honorable Court in this cause.

(5) Plaintiff further shows that it will suffer irreparable loss, damage and injury, and an illegal taking of its property, unless a temporary restraining order is issued by this Honorable Court on or before June 10th, 1931.

Wherefore plaintiff prays that each and all of said defendants be restrained from collecting said tax, or from enforcing, or taking any steps to enforce the terms and provisions of said Act, until the further order of this Honorable Court.

(6) And plaintiff further prays for all such other and further relief, both general and specific, as the exigencies of the case may require, or to which in equity it may be entitled.

W. C. McLain, Geo. M. Le Pine, Solicitors for Plaintiff.

[fol. 19] EXHIBIT "A" TO BILL OF COMPLAINT

An Act to Raise Revenue for the Support of the State Government by the Imposition of an Excise Tax Upon Electric Power Generated and Sold Within This State

Section 1. Be it enacted by the General Assembly of the State of South Carolina: (a) That in addition to all other taxes of every kind now imposed by law, every person, firm or corporation engaged in the business of manufacturing or generating hydro-electric power in the State of South Carolina shall be subject to the payment of an excise, license or privilege tax of five-tenths of one mill upon each kilowatt hour of hydro-electric power manufactured or generated, and said tax shall be paid to and collected by South Carolina Tax Commission.

(b) That in addition to all other taxes of every kind now imposed by law, every person, firm or corporation engaged in the business of manufacturing or generating electric power by the use of steam power in the State of South Carolina shall be subject to the payment of an excise, license, or privilege tax of five-tenths of one mill upon each kilowatt hour of electric power so manufactured or generated and said tax shall be paid to and collected by South Carolina Tax Commission.

(c) That in addition to all other taxes of every kind now imposed by law, every person, firm or corporation engaged in the business of selling electric power within the State of South Carolina shall be subject to the payment of an excise, license, or privilege tax of five-tenths of one mill upon each kilowatt hour of electric power sold in the State of South [fol. 20] Carolina and said tax shall be paid to and collected by South Carolina Tax Commission: Provided, That if such seller procures electric power which has been subject to the payment of the excise, license or privilege tax hereinbefore provided a credit on said tax to the amount of the excise tax already required to be paid by the person, firm or corporation generating the same within this State shall be allowed: Provided, Further, That the provisions of this Act shall not apply to the electric power manufactured or generated in another State and brought into this State until such power has lost its interstate character and immunities:

Provided, Further, That the provisions of this Act shall not apply to any person, firm or corporation owning and operating an electric manufacturing or generating plant of ten horse power or less, nor shall the provisions of this Act apply to industrial plants manufacturing or generating power for its own use, or for use upon its own premises by its bona fide operatives or employees but the tax shall be paid upon so much thereof as may be sold to other than its employees: Provided, Further, That the provisions of this Act shall not apply to municipalities manufacturing or generating electricity for the use of its customers.

Section 2. Every person, firm or corporation engaged in the business of manufacturing, generating or selling electric power in this State shall provide themselves with and keep the necessary instruments to show the amount of electric power manufactured, generated or sold, expressed in kilowatt hours, and shall keep permanent, legible records showing the amount of power, expressed in kilowatt hours, manufactured, generated or sold each day. Such records and instruments shall be subject to examination by the Tax Commission or its duly authorized representatives at any time during business hours.

[fol. 21] The South Carolina Tax Commission shall administer and enforce the tax imposed by this Act. It shall have the power to enter upon the premises of any tax payer and to examine, or cause to be examined, any of the instruments, books, records, etc., and to secure any other information directly or indirectly concerned in the enforcement of this Act. Also, make rules and regulations pertinent to the enforcement of this Act, which shall have the full force and effect of law.

Any person, firm or corporation required to keep either the necessary instruments or records prescribed in this Section shall be subject to a penalty One Hundred ($100.00) Dollars per day for each day's omission to keep either the required instruments or required records. Such penalties to be collected in the same manner as herein provided for the collection of delinquent taxes: Provided, upon reasonable cause shown, the South Carolina Tax Commission may remit or refund the said penalties in whole or in part.

Section 3. Every person, firm or corporation subject to the provisions of this Act shall between the first and tenth

of each month, make a true and correct return to the South Carolina Tax Commission in such form as it may prescribe, showing the exact amount of electric power manufactured, generated or sold, expressed in kilowatt hours, during the previous month and remit the tax therewith.

In case of failure to make a true and correct return, the Tax Commisison shall make the same upon such information as it may be able to obtain, assess the tax due thereon, and add a penalty of twenty-five per cent, and in case of failure to pay the tax, the South Carolina Tax Commission shall add a penalty of twenty-five per cent, whereupon the [fol. 22] South Carolina Tax Commission shall mail notice of the amount of taxes and penalty to the party failing to make such return or pay the tax, and if the tax and penalty is not paid within ten (10) days after mailing such notice, execution shall be issued in the manner and with the force provided hereafter in this Section. If any taxes or penalties imposed by this Act remain due and unpaid for a period of ten (10) days, the Tax Commission shall issue a warrant of execution directed to the Sheriff of any County of the State, commanding him to levy upon and sell the real and personal property of the tax payer found within his County, for the payment of the amount thereof with penalties and the costs of executing the warrant, and to return such warrant to the Tax Commission and to pay it the money collected by virtue thereof.

The Sheriff to whom such execution is directed shall proceed to enforce same in the same manner provided by law for the enforcement of an execution issued by a County Treasurer against a delinquent tax payer. That the taxes and all penalties herein provided for, shall be held as a debt payable to the State by the party against whom the same shall be charged, and all such taxes, penalties and assessments shall be first lien in all cases whatsoever upon all property of the party charged therewith.

Section 4. That if any clause, sentence, paragraph or part of this Act shall, for any reason, be adjudged by any Court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder of this Act, but shall be confined in its operation to the clause, sentence, paragraph or part thereof directly involved in the controversy in which such judgment shall have been

rendered. No caption of any Section or set of Sections [fol. 23] shall in any way affect the interpretation of this Act or any part thereof: Provided, That the collection of the taxes or penalties imposed under the provisions of this Act shall not be stayed or prevented by any injunction, writ or order issued by any Court or Judge thereon. In all cases in which any taxes or penalties are required to be paid hereunder by any person, firm or corporation and the Tax Commission shall claim the payment of the taxes or penalties so assessed, or shall take any step or proceedings to collect the same, the person, firm or corporation against whom such taxes or penalties are charged, or against whom such step or proceedings shall be taken shall, if he conceives the same to be unjust or illegal for any reason, pay the said taxes or penalties notwithstanding, under written protest, in such funds and monies as the South Carolina Tax Commission shall be authorized to receive, and upon such payment being made South Carolina Tax Commission shall make proper note that the same was paid under written protest and notify the State Treasurer that such taxes or penalties were paid under protest; that the person, firm or corporation so paying said taxes or penalties may at any time within thirty (30) days after making such payment, but not afterwards, bring an action against the South Carolina Tax Commission for the recovery thereof in any Court of competent jurisdiction and/or in proper cases in the Federal Courts and if it be determined in said action that such taxes or penalties were wrongfully and illegally collected for any reason going to the merits, then the Court before which the case is tried shall certify of record that the same were wrongfully collected and ordered to be returned with interest thereon at the rate of four (4%) per centum per annum. Whereupon the Tax Commission shall issue its warrant upon the State Treasurer for refunding [fol. 24] the taxes and penalties so paid, which shall be paid in preference to other claims against the treasury.

Section 5. That the South Carolina Tax Commission may, in its discretion, compromise any action arising under the provisions of this Act, either before or after prosecution commenced. The South Carolina Tax Commission may, upon good cause shown, remit any penalties accruing under this Act, in whole or in part.

Section 6. For the year 1931 the revenue produced under this Act shall reduce the 1931 property levy for State purposes to the full amount raised under the terms of this Act: Provided, Further, That for the year 1932 and thereafter, the revenue derived under the provisions of this Act shall be turned into the State Treasury for the support of the State Government.

Section 7. Any foreign corporation required to pay a tax hereunder for the year 1931, which shall not, for any cause whatsoever, have paid such license fee or tax, in addition to the payment of all licenses fees and taxes now or hereafter required by law, shall as an additional license fee or tax, for the year 1932, pay an amount equal to the license fee or tax provided for in this Act for the year 1931, and the payment of such additional license fee or tax for the year 1932 shall be a condition and part of the terms upon which they are allowed to enter this State and do business herein for the year 1932.

Section 8. The tax provided in this Act shall be calculated and paid on all electric power manufactured, generated or sold, on and after the first day of May, 1931.

Section 9. That this Act shall take effect immediately upon its approval by the Governor.

Approved the ninth day of May, 1931.

[fol. 25] EXHIBIT "B" TO BILL OF COMPLAINT

The Federal Power Commission

License on Navigable Waters

Project No. 516

South Carolina

Lexington Water Power Company

Whereas, by Act of Congress, approved June 10, 1920 (41 Stat., 1063) designated therein as "The Federal Water Power Act" and hereinafter called "the Act," the Federal Power Commission, hereinafter called "the Commission,"

is authorized and empowered, inter alia, to issue licenses for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development, transmission and utilization of power across, along, from or in any of the navigable waters of the United States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam; and

Whereas, Lexington Water Power Company hereinafter called "the Licensee," a corporation organized and existing under the laws of the State of South Carolina and having its office and principal place of business in the city of Columbia in the State of South Carolina has made application in due and proper form to the Commission for a license for a power project designated as Project No. 516 on the records of the Commission, and for authority to construct, [fol. 26] maintain and operate, at Dreher's Shoals, in the vicinity of Columbia, in the counties of Lexington, Richland, Newberry and Saluda, State of South Carolina certain project works, as hereinafter described, necessary or convenient for the development and improvement of navigation and for the development, transmission and utilization of power across, along, from and in navigable waters of the United States; and

Whereas, the Licensee has submitted to the Commission satisfactory evidence of its compliance with the laws of the State of South Carolina as required by Section 9, subsection (b) of the Act, and the Commission is satisfied as to the ability of the Licensee to carry out the plans for said project as filed with said application; and

Whereas, notice of said application has been given and published by the Commission, as required by Section 4 of the Act; full opportunity has been given to all interested parties to be heard, and no application for said project, or in conflict therewith, has been filed by any State or municipality; and

Whereas, the maps, plans and specifications of said project and of said project works, as hereinafter described, have been provisionally approved by the Commission, and the plans of the dam and other structures affecting naviga-

tion have been provisionally approved by the Chief of Engineers and the Secretary of War; and

Whereas, the Commission has found that said project, as hereinafter described, will be best adapted to a comprehensive scheme of improvement and utilization of said waterway for the purposes of navigation, of water power development and other beneficial public uses; and

Whereas, the Commission did on the 8th day of July, 1927 find that the contemplated improvement is desirable [fol. 27] and justified in the public interest for the purpose of improving or developing a waterway, namely, said Saluda River for the use or benefit of interstate and foreign commerce, a certified copy of the records of the Commission containing such finding being hereto attached; and

Whereas, the Licensee, on the 22nd day of July, 1927, pursuant to an authorization of its board of directors, a copy of the record thereof being hereto attached, accepted in writing all the terms and conditions of the Act and of this license;

Now, Therefore, the Commission hereby issues this license to the Licensee for the purpose of constructing, operating and maintaining certain project works necessary or convenient for the development and improvement of navigation and for the development, transmission and utilization of power across, along, from or in the Saluda River, navigable waters of the United States, and constituting a part of the project hereinafter described; said license, including the period thereof, being subject to all the terms and conditions of the Act and of the rules and regulations of the Commission pursuant thereto as amended and made effective on the first day of April, 1924, as though fully set forth herein, which said rules and regulations are attached hereto and made a part hereof, and being subject also to the following express conditions and limitations, to wit:

Article 1. This license is issued for a period of fifty (50) years from the date hereof, and in consideration of such license and the benefits and advantages accruing thereunder to the Licensee it is expressly agreed by the Licensee that the entire project, project area and project works as hereinafter designated and described, whether or not located in, on or along said Saluda River or upon lands of [fol. 28] the United States, shall be subject to all the terms

and conditions of this license, including the terms and conditions of the Act and of the rules and regulations of the Commission pursuant thereto and made a part of this license.

Article 2. The project covered by and subject to this license consists of—

A. All lands or interests of the Licensee in lands constituting the project area, which project area shall correspond approximately to the land which will be occupied by the dam, embankment, power house, and area to be covered by the reservoir, said project works and flood area being approximately shown by a certain exhibit which accompanied said application for license and which is designated and described as follows:

Exhibit J. Map in one sheet designated "Saluda River Hydro-electric Development—General map of development" (F. P. C. 516-10).

Exhibit K. Map in two sheets designated "General plan of dam and structures" (F. P. C. 516-11 and 12).

Exhibits J & K. Signed June 30, 1927—Lexington Water Power Company, by W. S. Murray, Vice President.

Within six (6) months from the date of issuance of this license, the Licensee shall submit a map or maps, showing accurately the boundary of said project area and the ownership or right of use therein, as required by Regulation 4 of the Rules and Regulations of the Commission.

B. All project works consisting of—

(a) A dam and reservoir across and in said Saluda River.

(b) A power house and appurtenant equipment, such [fol. 29] project works being more fully shown and described by certain exhibits which accompanied said application for license and which are designated and described as follows:

Exhibits J & K. Cited above.

Exhibit L. Conduits—profile, sections and details.
Typical sections of dam, intake tower to steel pipe conduit—sections and details.

Intake tower to arch conduit—section and details.
Conduits intake towers—boring data.
Conduits—details of outlet end.

Each of the above exhibits signed June 30, 1927, Lexington Water Power Company, by W. S. Murray, Vice President.

C. All other structures, fixtures, equipment, or facilities used or useful in the maintenance and operation of the project and located upon the project area, including such portable property as may be used and useful in connection with the project or any part thereof, whether located on or off the project area, if and to the extent that the inclusion of such property as a part of the project works is approved or acquiesced in by the Commission; also all other rights, easements, or interests the ownership, use, occupancy or possession of which is necessary or appropriate in the maintenance and operation of the project or appurtenant to the project area.

Article 3. The maps, plans, specifications, and statements designated and described in Article 2 hereof as Exhibits J, K and L respectively, and provisionally approved by the Executive Secretary for the Commission in accordance with its authorization of July 8, 1927, are hereby made a part of this license, and no substantial change shall here- [fol. 30] after be made in said exhibits, or any of them, until such change shall have been approved by the Commission: Provided, however, that if the Licensee deems it necessary or desirable that said approved maps, plans, specifications and statements, or any of them, be changed there shall be submitted to the Commission for approval amended, supplemental, or additional maps, plans, specifications and statements covering the proposed changes, and upon approval by the Commission of such proposed changes such amended, supplemental or additional maps, plans, specifications and statements shall become a part of this license and shall supersede, in whole or in part, such map, plan, specification, or statement, or part thereof, theretofore made a part of this license as may be specified, respectively, in the order or endorsement of approval.

Article 4. Said project works shall be constructed in substantial conformity with the approved maps, plans and

specifications thereof made a part of this license and designated and described in Articles 2 and 3 hereof or as changed in accordance with the provisions of said Article 3. Except when emergency shall require for the protection of navigation, life, health, or property, no substantial alteration or addition not in conformity with the approval plans shall be made to any dam or other project works constructed under this license without the prior approval of the Commission; and any emergency alteration or addition so made shall thereafter be subject to such modification and change as the Commission shall direct. Minor changes in or divergence from such approved maps, plans, and specifications may be made in the course of construction, if such changes will not result in decrease in efficiency, in material increase [fol. 31] in cost, or in impairment of the general scheme of development; but any such minor changes made without the prior approval of the Commission which in its judgment have produced or will produce any of such results shall be subject to such alteration as the Commisison may direct.

Article 5. The work of construction under this license, whether or not conducted upon lands of the United States, shall be subject to the inspection and approval of the U. S. District Engineer, Charleston, S. Car., or of such other officer or agent as the Commission may designate, who shall be the authorized representative of the Commission for such purposes. The Licensee shall notify such representative of the date upon which work will begin, and as far in advance thereof as said representative may reasonably specify, and shall notify him promptly in writing of any suspension of construction for a period of more than one week, and of its resumption and completion.

Article 6. Before beginning construction of the project works, the Licensee shall submit to the representative of the Commission plans of all the structures in sufficient detail to permit the checking of their safety and adequacy and shall obtain approval by said representative of the plans for such structures before commencing the construction thereof.

Before commencing the deposit of material in the dam, the Licensee shall submit to and obtain approval of the Commission of plans of dam, power house and spillway. Within six (6) months of the date of issuance of this

license, the Licensee shall submit to and obtain approval of the Commission of all plans and detail drawings required to be submitted under regulation 4 of the rules and regulations of the Commission.

[fol. 32] Subject to the provisions of Section 13 of the Act, the Licensee shall begin the construction of said project works within one year from the date of issuance hereof and shall in good faith and with due diligence prosecute such construction and shall complete the same on or before December 31, 1930, future installations to be made at such times as the market may justify and the Commission may direct.

Article 7. Upon the completion of the project works, or at such other time as the Commission may direct, the Licensee shall submit to the Commission for approval revised maps, plans, specifications, and statements, in so far as necessary to show any divergence from or variations in the project area as finally located or in the project works as constructed when compared with the area shown and the works designated or described in this license or in the maps, plans, specifications, and statements provisionally approved by the Commission under the provisions of Article 3 hereof, together with a statement in writing setting forth the reasons which in the opinion of the Licensee necessitated or justified variations in or divergence from the approved maps, plans, specifications, and statements. Such revised maps, plans, specifications, and statements shall, if and when approved by the Commission, be made a part of this license and shall to the extent and in the particulars set forth in the order or endorsement of approval, be substituted for the maps, plans, specifications and statements theretofore approved by the Commission under the provisions of Article 3 hereof. The maps finally approved by the Commission and made a part of this license under the provisions of Article 3 and/or 7 hereof shall show the project area to an adequate scale and the boundary thereof either by legal sub-
[fol. 33] divisions, by metes and bounds survey, or by uniform offsets from centerline survey. Said project area shall include all lands without respect to ownership and whether or not the exact boundaries can be definitely fixed and determined, the use and occupancy of which are or will

be valuable or serviceable in the maintenance and operation of the project; on which are located or to which are appurtenant the project works (other than portable property) and the rights, easements, or interests likewise valuable and serviceable; and the ownership or possession, or the right of use and occupancy, of which are subject to acquisition by the United States under the provisions of Section 14 of the Act. Said maps shall show the ownership of each parcel of land in said project area, and with respect to each parcel to which the Licensee has not the fee title, the character of the right of use and occupancy possessed by the Licensee together with the term of such right.

Article 8. In so far as any material is dredged or excavated in the prosecution of the work herein authorized, it shall be removed and deposited so it will not interfere with navigation and to the satisfaction of said District Engineer.

Article 9. For the purpose of determining the stage and flow of the stream or streams from which water is to be diverted for the operation of said project works and of the amount of water held in and drawn from storage, the Licensee shall install on or before the date the project is put into operation and thereafter maintain a standard staff or recording gage and gaging station in the headwater and in the tailwater of said project, shall provide such recording gages and gaging stations in said river below the outlet of the spillway and at such other places [fol. 34] as may be deemed necessary and shall provide for the required readings of such gages and for the adequate rating of said station or stations. The Licensee shall also install and maintain standard meters adequate for the determination of the amount of electric energy generated by said project works. The number, character, and location of gages, meters or other measuring devices, and the method of operation thereof may be altered from time to time if necessary to secure adequate determinations, but such alteration shall not be made except with the approval of the Commission or its authorized representative or upon the specific direction of the Commission. The installation of gages, the ratings of said stream or streams, and the determination of the flow thereof, shall be under the

supervision of the District Engineer of the United States Geological Survey having charge of stream gaging operations in the region of said project, and the Licensee shall reimburse the said United States Geological Survey for costs incurred in such supervision or for such part thereof as said District Engineer may deem equitable in the circumstances. The Licensee shall keep accurate and sufficient record of the foregoing determinations to the satisfaction of the Commission, shall make return of such records annually, at such time and in such form as the Commission may prescribe.

Article 10. The Licensee shall be liable for all damages occasioned to the property of others by the construction, maintenance or operation of said project works, or of the works appurtenant or accessory thereto, and in no event shall the United States be liable therefor.

Article 11. In the construction and maintenance of the project works herein specified, the Licensee shall place and maintain suitable structures to reduce to a reason- [fol. 35] able degree the liability of contact between its transmission lines and telegraph, telephone and other signal wires or power transmission lines not owned by the Licensee, and shall also place and maintain suitable structures and devices to reduce to a reasonable degree the liability of any structures or wires falling and obstructing traffic and endangering life on highways, streets, or railroads.

Article 12. The Licensee shall allow officers and employees of the United States free and unrestricted access in, through and across the said project and project works in the performance of their official duties.

Article 13. The operation of any navigation facilities which may be constructed as a part of or in connection with any dam or diversion structure built under the provisions of this license shall at all times be controlled by such reasonable rules and regulations in the interest of navigation, including the control of the level of the pool caused by such dam or diversion structure, as may be made from time to time by the Secretary of War. Such rules and regulations may include the maintenance and operation by the Licensee at its own expense of such lights

and signals as may be directed by the Secretary of War, and such fishways as may be prescribed by the Secretary of Commerce.

Article 14. The United States specifically retains and safeguards the right to use water in such amount, to be determined by the Secretary of War, as may be necessary for the purposes of navigation and the operations of the Licensee so far as they affect the use, storage, and discharge from storage of waters affected by this license, shall at all times be controlled by such reasonable rules and regulations as the Secretary of War may prescribe [fol. 36] in the interests of navigation and as the Federal Power Commission may prescribe in the interests of flood control and of the fullest practicable use of said waters for power purposes.

Article 15. Whenever the United States shall desire to construct, complete, or improve navigation facilities in connection with said project, the Licensee shall convey to the United States free of cost, such of its lands and its rights of way, and such right of passage through its dam or other structures and permit such control of pools as may be required to complete such navigation facilities.

Article 16. That the Licensee shall furnish, free of cost, to the United States power for the operation of such navigation facilities, whether constructed by the Licensee or by the United States.

Article 17. The Licensee shall cut and remove or destroy to the satisfaction of the representative of the Commission, all brush and trees in that zone within and adjacent to the area to be submerged which is included between the contour of elevation 290 feet above mean sea level, and a line 15 feet horizontally from the outside of the contour 365 feet above mean sea level, and shall remove or destroy all floatable refuse or other material within said area to be submerged.

Article 18. The Licensee shall take such measures as may be required by the Commission for the effective prevention of the breeding of malarial mosquitoes in the reservoir, and shall, before permitting the storage of water in said reservoir, submit to the Commission and secure its approval of a plan to accomplish this purpose.

Article 19. The Licensee hereby agrees as a condition of this license that the amount to be entered upon the [fol. 37] fixed capital accounts of said project and reported to the Commission as representing the actual legitimate cost thereof and the actual legitimate investment therein up to the date of this license, whether consisting of expenditures actually made, of charges accrued, or of liabilities or obligations incurred, shall be determined by the Commission in accordance with the provisions of the Act and of the regulations established thereunder; and it is further agreed by the License that upon completion of the construction of said project for which date of completion is specified in article 6 hereof or of any addition to or betterment of said project, the Licensee shall file with the Commission a statement, under oath, in duplicate, in such detail as the Commission may require, showing the actual legitimate cost of construction thereof, together with the price paid for water rights, rights of way, lands or interest in lands constituting any part of the project property subject to the provisions of this license, all as specified in regulation 20, section 2, of said rules and regulations. Such statement or statements shall include all proper and legitimate costs, whether incurred prior to the date of this license or on and after such date; and the Licensee shall, if requested by the Commission, show separately on such statement or statements the items and amounts of cost incurred prior to the issuance of this license as determined by the Commission as hereinbefore in this article provided, with such other details with respect to the cost of the project or any part thereof as the Commission may require. Each and every item of cost included in such statements shall be supported by proper voucher or other record; and any such voucher or record, or certified copy thereof, in support of any item properly includible in said cost shall become a part of the permanent records of said project and shall be kept and retained by the Licensee in the manner required by the Commission.

[fol. 38] Article 20. Whenever the Licensee is directly benefited by the construction work of another licensee, a permittee, or of the United States of a storage reservoir or other headwater improvement, the License shall reimburse the owner of such reservoir or other improvement for such

part of the annual charges for interest, maintenance and depreciation thereon as the Commission may deem equitable. The proportion of such charges to be paid by the Licensee shall be determined from time to time by the Commission. Whenever such reservoir or other improvement is constructed by the United States the Licensee shall pay similar charges into the Treasury of the United States upon bills rendered by the Commission.

Article 21. The Licensee shall pay to the United States reasonable annual charges for the purpose of reimbursing the United States for the costs of the administration of the Act and for recompensing it for the use, occupancy and enjoyment of its lands or other property hereinbefore described. The payment by the Licensee of such annual charges for any calendar year shall be made to the United States at the end of the year, or within thirty days thereafter, upon bills rendered or approved by the Commission. Such charges shall be determined in accordance with the provisions of Regulation 14 of said rules and regulations of the Commission, and for the purposes of such determination the power capacity of the project shall be taken as 63,640 horsepower.

Article 22. After the first twenty years of operation of said project under this license, out of surplus earned thereafter, if any, accumulated in excess of a specified reasonable rate of return upon the actual, legitimate investment of the Licensee in said project, all as defined in and deter- [fol. 39] mined by the provisions of regulation 17 of said rules and regulations of the Commission, the Licensee shall establish and maintain amortization reserves, which reserves shall, in the discretion of the Commission, be held until the termination of the license or be applied from time to time in reduction of the net investment. Such specified rate of return shall, subject to the proviso of paragraph A, section 3 of said regulation, be one and one-half (1½) times the weighted average annual interest rate payable on the par value of the bona fide interest-bearing debt of the Licensee actually outstanding, in whole or in part, on account of project property at the beginning of the period of amortization and of each calendar year thereafter; such weighted average annual interest rate being determined as provided in paragraphs B and C of section 3 of said

regulation 17: Provided, That, if at the beginning of the period of amortization or of any calendar year thereafter, the outstanding interest-bearing debt of the Licensee on account of the project or projects under license, together with any other works or property operated in connection therewith, is less than 25 per cent of the actual, legitimate investment of the Licensee in said project or projects, then and in such event for the calendar year next following the specified rate of return shall be two (2) times the legal rate of interest in the State in which the project or major part thereof is located.

Subject to the provisions of section 6 of said regulation, the following proportions of such surplus earnings shall be paid into and held in such amortization reserves: Of all surplus earnings up to and including 2 per cent upon the actual, legitimate investment, 30 per cent thereof shall be so paid; of all surplus earnings in excess of 2 per cent and not in excess of 4 per cent upon such investment, 50 [fol. 40] per cent thereof shall be so paid; of all surplus earnings in excess of 4 per cent and not in excess of 6 per cent, 70 per cent thereof shall be so paid, and of all surplus earnings in excess of 6 per cent, 90 per cent thereof shall be so paid: Provided, That if at the end of any calendar year of the amortization period the Commission shall find that the accumulated earnings of the Licensee during the period of operation, including the first twenty (20) years thereof, have not yielded a fair return upon the actual, legitimate investment in the project or projects under license, the proportion of such surplus earnings for such calendar year and for succeeding calendar years to be paid into such amortization reserves shall be ten (10) per cent thereof until such time as the accumulated earnings of the Licensee represent, in the judgment of the Commission, a fair return upon such investment for such period of operation.

Article 23. No lease of said project or part thereof whereby the lessee is granted the exclusive occupancy, possession or use of project works for purposes of generating, transmitting or distributing power shall be made without the prior written approval of the Commission; and the Commission may, if in its judgment the situation warrants, require that all the conditions of this license, of the Act,

and of said rules and regulations of the Commission shall be applicable to such lease and to such property so leased to the same extent as if the lessee were the Licensee hereunder: Provided, That the provisions of this article shall not apply to parts of the project or project works which may be used by another jointly with the Licensee under a contract or agreement whereby the Licensee retains the occupancy, possession, and control of the property so used and receives adequate consideration for such joint use, or to leases of land while not required for purposes of gen- [fol. 41] erating, transmitting, or distributing power, or to buildings or other property not built or used for said purposes, or to minor parts of the project or project works the leasing of which will not interfere with the usefulness or efficient operation of the project by the Licensee for said purposes.

Article 24. It is hereby understood and agreed that the Licensee, its successors and assigns will, during the period of this license, retain the possession of all project property covered by this license as issued or as hereafter amended, including the project area, the project works, and all franchises, easements, water rights, and rights of occupancy and use; and that none of such properties valuable and serviceable to the project and to the development, transmission, and distribution of power therefrom will be voluntarily sold, transferred, abandoned, or otherwise disposed of without the approval of the Commission: Provided, That a mortgage or trust deed or judicial sales made thereunder, or tax sales, shall not be deemed voluntary transfers within the meaning of this article. The Licensee further agrees on behalf of itself, its successors and assigns, that, in the event said project is taken over by the United States upon the termination of this license, as provided in Section 14 of the Act, or is transferred to a new Licensee under the provisions of Section 15 of the Act, it will be responsible for and will make good any defect of title to or of right of user in any such project property which is necessary or appropriate or valuable and serviceable in the maintenance and operation of the project, and will pay and discharge or will assume responsibility for payment and discharge of all liens or incumbrances upon said project or project property created by said Licensee or created or incurred after

the issuance of this license: Provided, That the provisions [fol. 42] of this article are not intended to prevent the abandonment or the retirement from service of structures, equipment, or other project works in connection with replacements thereof when they become obsolete, inadequate, or inefficient for further service due to wear and tear, or to require the Licensee for the purpose of transferring the project to the United States or to a new Licensee to acquire any different title or right of user in any such project property than was necessary to acquire for its own purposes as Licensee.

Article 25. The Licensee shall abide by such reasonable regulation of the services to be rendered to customers or consumers of power, and of rates and charges of payment therefor, as may from time to time be prescribed by any duly constituted agency of the State in which the service is rendered or the rate charged; and in case of the development, transmission, distribution, sale or use of power in public service by the Licensee or by its customers engaged in public service within a State which has not authorized and empowered a commission or other agency or agencies within said State to regulate and control the services to be rendered by the Licensee or by its customers engaged in public service, or the rates and charges of payment therefor, or the amount or character of securities to be issued by any of said parties, it is agreed as a condition of this license that jurisdiction is hereby conferred upon the Commission, upon complaint of any person aggrieved or upon its own initiative, to exercise such regulation and control until such time as the State shall have provided a commission or other authority for such regulation and control: Provided, That the jurisdiction of the Commission shall cease and determine as to each specific matter of regulation and control prescribed in this Article as soon as the State [fol. 43] shall have provided a commission or other authority for the regulation and control of that specific matter.

Article 26. Wtih the written consent of the Licensee, the Commission may by order made under its seal, and after the public notice required by Section 6 of the Act, modify, alter, enlarge or omit, in so far as authorized by law, any one or more of the conditions or provisions of this license.

Article 27. The enumeration herein of any rights reserved to the United States or to any State or municipality under the Act, or of any requirement of the Act or of said rules and regulations of the Commission shall not be construed in any degree as impairing any other rights so reserved by the Act or as limiting the force of any other requirement of said Act or of said regulations.

In Witness Whereof the Federal Power Commission has caused its name and seal to be hereto signed and affixed by its Executive Secretary, O. C. Merrill, this 5th day of August, 1927, pursuant to authority given at its meeting of July 8, 1927, a certified copy of the record thereof being hereto attached.

Federal Power Commission, by O. C. Merrill, Executive Secretary. (Seal.)

In testimony of acceptance of all the terms and conditions of the Federal Water Power Act of June 10, 1920, and of the further conditions imposed in the foregoing license, the Licensee, this 22nd day of July 1927, has caused its name and corporate seal to be hereto signed and affixed by W. S. Barstow and C. N. Wilson its President and Secretary pursuant to a resolution of its board of directors, [fol. 44] passed on the 22nd day of July, 1927, a certified copy of the record thereof being hereto attached.

Lexington Water Power Company. W. S. Barstow, President.

Attest: C. N. Wilson, Secretary.

Duly sworn to by J. F. McKenna. Jurat omitted in printing.

[fol. 45] IN UNITED STATES DISTRICT COURT

APPLICATION FOR TEMPORARY RESTRAINING ORDER AND FOR INTERLOCUTORY INJUNCTION

Now comes the above named plaintiff and shows to the Court as follows:

That it has instituted in this Court by Bill of Complaint duly filed, an action against the above named defendants as members of the South Carolina Tax Commission, as

will more particularly appear from the Bill of Complaint which is now referred to and made a part of this application. The object and purpose of this suit is to secure from this Honorable Court a temporary interlocutory injunction, and a decree enjoining permanently and perpetually the defendants, who constitute the South Carolina Tax Commission, from enforcing or taking any steps to enforce, or instituting any proceeding whatsoever towards enforcing or giving effect to, a certain Act of the State of South Carolina approved May 9th, 1931, and entitled "An Act to [fol. 46] raise revenue for the support of the State Government by the imposition of an excise tax upon electric power generated and sold within this State," set forth in said Bill of Complaint, or to require the plaintiff to comply with any of the provisions thereof, as well as from commencing any suit or proceeding against the plaintiff to enforce or collect any penalties, fines or forfeitures provided for or imposed under said Act, or under any other law of the State of South Carolina, by reason of anything done or omitted to be done by this plaintiff contrary to the terms or provisions of said Act. The further object of this suit is to have this Act declared to be illegal, null and void, and of no force and effect upon the grounds specifically set forth in the Bill of Complaint, which is hereto attached and made a part of this motion.

Plaintiff sets forth in said Bill, alleges and shows that it will suffer irreparable loss, damage and injury, unless a temporary restraining order is issued by the Court pending a hearing upon its application for an interlocutory injunction, as prayed for in said Bill of Complaint, and one of the objects and prayers of said Bill is that upon a hearing for a preliminary injunction being had, then under Section 266 of the Judicial Code an interlocutory injunction, as prayed for in said Bill, be issued, enjoining and restraining the defendants, and each of them, until a final decree herein, in all respects as to which a perpetual injunction is sought in said Bill.

Wherefore application is now made:

(1) For a temporary restraining order to issue at once, enjoining and restraining all of said defendants from enforcing, or attempting to enforce, the aforesaid Act approved May 9th, 1931, until the further order of this Court;

and this plaintiff, as more fully set forth in the Bill of Com-
[fol. 47] plaint, avers and shows that said temporary restraining order is necessary to prevent immediate and irreparable injury, loss and damage to plaintiff, its rights and property, and to preserve the status quo until plaintiff's application for an interlocutory injunction can be set down for hearing and heard upon notice duly given, because payments under the said Act approved 9th May, 1931, attacked in this proceeding and sought to be declared null and void, will under the terms of said Act become payable on or before June 10th, 1931, and plaintiff will be compelled to comply therewith, or incur the penalties provided by law for the violation or disregard thereof, unless the temporary restraining order, for which application is now made, be granted and the enforcement of said Act be restrained until the application for interlocutory injunction can be heard and disposed of under Section 266 of the Judicial Code; and

(2) Application is likewise now made under Section 266 of the Judicial Code for an interlocutory injunction as prayed in said Bill, and upon the grounds and for the reasons therein set forth, and this Honorable Court is petitioned to call to its assistance to hear and determine this application, two other Judges, and that the statutory notice of the hearing of this application be given to the Governor and to the Attorney General of the State of South Carolina, and to all of the defendants to the said Bill, and that an order issue in due course requiring the defendant to show cause at the time and place to be fixed by this Honorable Court according to law, why said interlocutory injunction should not issue as prayed for in the Bill.

This application is based upon the verified Bill of Complaint which has been duly filed therein.

W. C. McLain, Geo. M. Le Pine, Plaintiff's Solicitors.

[fol. 48] IN UNITED STATES DISTRICT COURT

RULE TO SHOW CAUSE ON APPLICATION FOR TEMPORARY RESTRAINING ORDER AND INTERLOCUTORY INJUNCTION

Upon reading the verified Bill of Complaint this day filed in this cause, and the plaintiff having applied for an interlocutory injunction, upon consideration thereof:

It Is Ordered that the defendants Walter G. Query, J. P. Derham and Frank C. Robinson, constituting the South Carolina Tax Commission, do show cause before me in the United States Court Room, at Charleston, South Carolina, on the 9th day of June, 1931, at 10:00 o'clock A. M., or as soon thereafter as counsel can be heard, why a Court consisting of three judges as provided by Section 266, amended, of the Judicial Code, should not be convened for hearing the application for interlocutory injunction and why, in the meantime, and until the hearing of said application, and pending the further order of this Court, the said defendants should not be restrained from enforcing, [fol. 49] or taking any steps to enforce, directly or indirectly, the terms and provisions of an Act of the General Assembly of South Carolina approved 9th May, 1931, entitled: "An Act to raise revenue for the support of the State Government by the imposition of an excise tax upon electric power generated and sold within this State."

Ernest F. Cochran, United States District Judge.

Charleston, S. C., June 6, 1931.

[fol. 50] In United States District Court

Answer—Filed July 3, 1931

The joint and several answer of the defendants, South Carolina Tax Commission, Walter G. Query, J. P. Derham and Frank C. Robinson, as members of South Carolina Tax Commission, to the bill of complaint of the plaintiff above named, would respectfully show:

First. Defendants admit the allegations contained in the First paragraph of the bill of complaint.

Second. Defendants admit the allegations contained in the Second paragrapn of the bill of complaint, except that Frank C. Robinson is a resident of the County of Richland, the said Frank C. Robinson being a citizen and resident of the county of McCormick, State of South Carolina.

Third. Defendants admit the allegations contained in the Third paragraph of the bill of complaint, but respectfully crave reference to the Act of the General Assembly of the

State of South Carolina as more fully setting forth its pur-
[fol. 51] port and terms than as set forth in the Third paragraph of said bill of complaint.

Fourth. Defendants admit the allegations contained in the Fourth paragraph of the bill of complaint. Defendants further aver, upon information and belief, that plaintiff does not own or operate any plant or facilities for generating and manufacturing electricity outside of the State of South Carolina.

Fifth. Answering the Fifth paragraph of the bill of complaint, defendants admit that the object of this suit is that plaintiff may be relieved from the payment of the taxes imposed by the Act approved 9th of May, 1931, and that the same be declared illegal, null and void, but these defendants deny that said Act infringes any of the plaintiff's constitutional rights, either Federal or State.

Sixth. Defendants have not knowledge or information sufficient to form a belief as to the allegations contained in the Sixth paragraph of the bill of complaint, but allege that if such allegations be true, they are irrelevant and impertinent.

Seventh. Defendants have not knowledge or information sufficient to form a belief as to the allegation contained in the Seventh paragraph of the bill of complaint.

Eighth. Defendants deny so much of the Eighth paragraph of the bill of complaint as alleges that plaintiff is an instrumentality or agency of the United States, that on the contrary as alleged in the First paragraph of the bill of complaint, it is a corporation duly organized and existing under and by virtue of the laws of the State of South Carolina with certain burdens placed upon it by the United
[fol. 52] States Government for the regulation and control of navigation.

Ninth. Defendants admit the payment of the several other taxes alleged in the Ninth paragraph of the bill of complaint, but specifically deny that the State had exhausted its right to tax plaintiff in such other forms as it might elect and that in exacting such other tax there is no impairment of any contract which plaintiff may have had with the State of South Carolina.

Tenth. Defendants have not knowledge or information sufficient to form a belief as to the allegations contained in the Tenth paragraph of the bill of complaint; that defendants allege if any electric energy whatsoever is generated by oil or combustion engines within the State of South Carolina, that the electric energy so generated is inconsequential and comparatively so infinitesimal as not to require any consideration in this case.

Eleventh. Defendants deny the allegations contained in the Eleventh paragraph of the bill of complaint.

Twelfth. Defendants deny the allegation contained in the Twelfth paragraph of the bill of complaint.

Thirteenth. Answering the Thirteenth allegation of the bill of complaint, these defendants have not knowledge or information sufficient to form a belief as to what part of the gross revenues of plaintiff is required to pay all of its taxes to the State of South Carolina and its subdivisions, and defendants deny that the said tax will amount to confiscation, or that it is contrary to any provision of the State or Federal Constitution.

Fourteenth. Defendants have not knowledge or informa- [fol. 53] tion sufficient to form a belief as to the allegations contained in the Fourteenth paragraph of the bill of complaint, and wherever reference therein is made to the Act of the General Assembly of South Carolina drawn into question in this litigation, these defendants crave reference thereto as more fully setting forth its terms and conditions.

Fifteenth. Defendants deny the allegations contained in the Fifteenth paragraph of the bill of complaint.

Sixteenth. Defendants deny the allegations contained in the Sixteenth paragraph of the bill of complaint.

Seventeenth. Defendants deny so much of the Seventeenth paragraph of the bill of complaint as alleges that electricity generated at the plant of the plaintiff is transmitted to and consumed by customers of said other corporations in the State of North Carolina and that the larger part of the station use in South Carolina is in conjunction with and incidental to such genertion of electricity in intertsate commerce.

These defendants allege that the electric energy generated or manufactured by plaintiff in this State is taken from nature, that is from the earth, air and water of South Carolina; that the electric energy so collected, manufactured and generated may as it proceeds from the generator be measured in kilowatt hours; that thereafter in order to prepare said electric energy for transmission to North Carolina, and before such transmission or journey commences, it is turned into a transformer, or transformers, and therein prepared so as to be of higher tension or higher voltage and from thence the journey towards North Carolina begins. That the tax provided in said Act is applied to the electric power or energy which has been collected from the earth, air and water, or nature in South [fol. 54] Carolina and before it is prepared for and begins its interstate journey.

Defendants have not knowledge or information sufficient to form a belief as to the other allegations of technical nature in said Seventeenth paragraph contained, but allege that if they are true, they are irrelevant and impertinent.

Eighteenth. Defendants deny each and every allegation contained in the Eighteenth paragraph of the bill of complaint.

For a first, further, separate and distinct defense, these defendants allege that plaintiff has a full, complete and adequate remedy at law, as provided by the Tax Act in question.

For a second, further, separate and distinct defense in point of law arising upon the face of the bill of complaint herein, defendants say that the facts alleged in said bill of complaint are insufficient to constitute a valid cause of action in equity.

For a third, further, separate and distinct defense, it appears from the face of said bill of complaint that the supposed grounds of jurisdiction of the Federal Court are frivolous with no facts alleged to show or make it appear that any real substantial Federal question is involved.

Wherefore defendants deny that the plaintiff is entitled to the relief prayed for in the bill of complaint, or any part thereof, or to any other relief against these defend-

ants, and pray that the bill of complaint be dismissed with [fol. 55] costs.

John M. Daniel, Attorney General for South Carolina; J. Fraser Lyon, Attorneys for Defendants.

[fol. 56] *Duly sworn to by W. G. Query. Jurat omitted in printing.*

[fol. 57] In United States District Court

[Title omitted]

Affidavit of W. E. Rowe—Filed July 6, 1931.

State of South Carolina,
County of Richland:

Personally appeared W. E. Rowe, who being duly sworn, deposes and says:

That during the past nine years I have been and am now Dean of the School of Engineering of the University of South Carolina.

That I have examined the electric plant of Lexington Water Power Company located on Saluda River about fifteen miles from the City of Columbia, South Carolina. That the generators of this Company generate electric current of 13,800 volts, pressure; that the electricity at this voltage is measured by appropriate meters and is then passed into transformers appurtenant to the power house; that these transformers receive the current generated from the generators at 13,800 volts and by a process of induction a current of 114,000 volts is created and delivered to the trans- [fol. 58] mission lines which lead to distant points where it is again passed into transformers at this high voltage and by a reverse process of induction another current of electricity is produced at a lower voltage. This process of lowering the voltage may be continued in the same manner until a current of electricity of sufficiently low voltage is reached as will suit the individual consumer.

That I am imformed that the high voltage lines into which the 114,000 voltage current is passed at or near the power station belong to the Duke Power Company and to other power companies who take electric current at the 114,000

volts. The size- of the transmission lines are insufficient to carry any appreciable amount of electric current at 13,800 volts to consumers in North Carolina or Georgia, and for this reason the electrical current at 13,800 volts as it comes from the generator is changed by means of the transformers into an electrical current of 114,000 volts which is of sufficient pressure to be transmitted to consumers in North Carolina and Georgia without excessive line losses over the lines which the Duke Power Company and others taking such electric current have established.

That whatever may be theoretically surmised as to the production of the transmission of electric power, the fact is that the electric power as it comes from the generators of the Lexington Power Company could not without substan-
[fol. 59] tial change be transmitted over the wires erected by the several power companies for that purpose unless such current was transformed and put in condition to be transmitted over the wires now erected for that purpose on its interstate journey.

W. E. Rowe.

Sworn to and subscribed before me this 3rd day of July, A. D. 1931. Robt. Moorman, Notary Public for South Carolina. (Seal.)

[fol. 60] In United States District Court for the District of Idaho, Southern Division

In Equity. No. —

Utah Power & Light Co., a Corporation, Plaintiff,

against

Emmitt Pfost, Commissioner of Law Enforcement of the State of Idaho, and Fred J. Babcock, Attorney General of the State of Idaho, Defendants

Affidavit of Robert A. Millikan

State of California,
County of Los Angeles, ss:

Robert A. Millikan, being first duly sworn, deposes and says:

1. My name is Robert A. Millikan; residence, Pasadena, California; age, 63 years. My official position is Director

of the Norman Bridge Laboratory of Physics of the California Institute of Technology, Pasadena, California. I took my Doctor's degree in physics at Columbia University in 1895. I then attended the Universities of Jena and Gottingen in Germany, and from the fall of 1896 until the fall of 1921 was engaged in research and teaching at the University of Chicago, the major part of my activities being in the field of electrical theory and practice. During the past ten years I have been directly engaged in research and teaching in this same field at the California Institute of Technology. My work in physics has been recognized in a number of ways, among which may be mentioned the award of the Edison Medal of the American Institute of Electrical Engineers, the Faraday Medal by the London Chemical [fol. 61] Society, and the Nobel Prize in Physics by the Nobel Prize Committee.

2. The terms "generation," "manufacture" and "production" as applied to energy in the electrical form are merely convenient designations applied to one aspect of the process of transferring energy from some source in nature (such as falling water) to some point where it may be usefully applied. The various electrical facilities used in said process are purely transferring devices, and the entire combined process,—electric, magnetic and mechanical,—is integral, continuous and essentially simultaneous, as electricity travels approximately with the speed of light—186,000 miles per second.

There is a continuous electrical and electromagnetic path between the windings in the generator and the windings in the consumer's motor (or between the generator windings and the filament in an electric lamp or the electrodes in an electrochemical cell). The entire electric system is a device for transferring the force of the falling water to and applying it at the point where it is to be utilized. Except as, and to the extent that, energy is called for and used at the final point of utilization, the electric generator neither receives from the water wheel shaft nor delivers to the electric transmission lines any energy other than that necessary to hold the equipment under constant rotation and electric charge in instant readiness to serve.

The power being transferred at any instant along the electric circuit existing between an electric generator at one place and a receiving device at another place is calculable at

any point in the circuit from the electrical pressure or voltage between wires and the magnitude and characteristics of the electric current circulating in the wires, and is commonly expressed in kilowatts.

The "kilowatt-hour," the usual unit for measuring energy in the electrical form, is a mathematical product of the power relation in the electric circuit between a gen- [fol. 62] erator and a receiving device measured in kilowatts, and the duration of time over which that relation is utilized, measured in hours.

3. If we assume the simple case of a power station "A" connected to a transmission line extending to consuming device "B" and that all the power generated at station "A" is used by the consuming device "B," the process above described is exactly what transpires. The generator at "A" is idle except as the consuming device at "B" is using power or electricity and when it is so using power or electricity the process of generation, transmission and use is integral and essentially simultaneous regardless of the distance in transmission within any presently known commercial limits. The whole system must operate essentially simultaneously or not at all.

In the commercial generation, transmission and distribution of electricity the process is essentially unchanged. Electricity generated at different stations may, for commercial convenience, reliablity of service, and similar factors, be brought together at a single distributing station or substation, as it is sometimes called, from which point it is in turn distributed over different lines to consumers' different points of use. If no consumer is using power on any distribution line no demand is placed on the generators and no electricity is generated, except as above stated, than necessary to hold the equipment under rotation and electric charge. If the aggregate electrical demand of the various consuming devices of the different consumers is less than the capacity of the generators, that part of the generating equipment which is not required to serve the immediate present combined demands of the various consumers remains idle, or delivers only such power or electricity as is required to meet the combined demands of the consumers. Similarly, meters placed at the generating station, or at any point between the generating station or stations and the

distributing substation, register the power output (subject [fol. 63] to losses as they vary from point to point) required to meet the then total demands of all the consumers, and the duration of such aggregate total demands. They afford measurements of aggregate consumers' use as well as measurements of generation, because the two are corelative.

The various processes involved in stepping up and stepping down electricity through transformers involve no change in the essential nature of the electrical processes herein first above mentioned. They are merely devices adapted to the needs of the particular situation developed primarily with a view to efficiency and economy in operation. For illustration, electricity could be generated at 6600 volts and economically transmitted from the station for a distance of a few miles, and used by a consumer whose motors operated at that voltage without any process of transformation at either end of the circuit. This would probably be done under such conditions of transmission and use. But as distances of transmission increase, transmission at such a relatively low voltage involves either excessive size of conductors or excessive losses in transmission and the economic and practical thing to do is to step up the voltage (increase the pressure) for economy in transmission. The transformers, therefore, are merely an aid to the transfer or transmission of energy in the electrical form, or what we call electricity.

The whole electrical system is merely a device for transmitting the energy of the falling water from the point at which it falls to a distant point at which it is more convenient to utilize it. In principle this transmission might be done just as well by a water wheel, pulley and belt, or any other mechanical agency for transferring energy, from one point to another, as by an electrical system. If it were so transmitted by a belt, for example, the energy transferred in a given time would be obtained from the tension [fol. 64] in the belt, its speed of travel, and the total time.

(Sgd.) Robert A. Millikan.

Subscribed and sworn to before me this ninth day of June, 1931. (Sgd.) Inga Howard, Notary Public, Residing at Pasadena, California. My commission expires March 24, 1933. (Seal.)

UNITED STATES OF AMERICA,
District of Idaho, ss:

I, W. D. McReynolds, Clerk of the United States District Court for the District of Idaho, do hereby certify that the foregoing copy of affidavit of Robert A. Millikan is a correct transcript of the original as the same appears of record and on file in my office.

Witness my hand and the seal of said court this June 27, 1931.

W. D. McReynolds, Clerk.

[fol. 65] IN UNITED STATES DISTRICT COURT

OPINION—Filed Sept. 7, 1931

PARKER, Circuit Judge:

These are three independent suits instituted to enjoin the enforcement of the South Carolina statute imposing a tax on the production and sale of electric power. An interlocutory injunction is asked in each, and a court of three judges has been convened pursuant to section 266 of the Judicial Code and the cases have been heard together. Each suit involves an amount largely in excess of what is required for purposes of jurisdiction; and jurisdiction in equity is not controverted and unquestionably exists for the purpose of avoiding a multiplicity of suits.

The statute in question is entitled, "An Act to Raise Revenue for the Support of the State Government by the Imposition of an Excise Tax upon Electric Power Generated and Sold Within This State"; and the pertinent provisions thereof are as follows:

"Section 1. Be it enacted by the General Assembly of the State of South Carolina:

(a) That in addition to all other taxes of every kind now imposed by law, every person, firm or corporation engaged in the business of manufacturing or generating hydro-electric power in the State of South Carolina shall be subject to the payment of an excise, license or privilege tax of five-tenths of one mill upon each kilowatt hour of hydro-electric power manufactured or generated, and said

tax shall be paid to and collected by South Carolina Tax Commission.

"(b) That in addition to all other taxes of every kind now imposed by law, every person, firm or corporation engaged in the business of manufacturing or generating electric power by the use of steam power in the State of South Carolina shall be subject to the payment of an excise, license, or privilege tax of five-tenths of one mill upon each kilowatt hour of electric power so manufactured or generated and said tax shall be paid to and collected by South Carolina Tax Commission.

"(c) That in addition to all other taxes of every kind now imposed by law, every person, firm or corporation engaged in the business of selling electric power within the State of South Carolina shall be subject to the payment of an excise, license, or privilege tax of five-tenths of one mill upon each kilowatt hour of electric power sold in the State of South Carolina and said tax shall be paid to and collected by South Carolina Tax Commission: Pro-[fol. 66] vided, that if such seller procures electric power which has been subject to the payment of the excise, license or privilege tax hereinbefore provided a credit on said tax to the amount of the excise tax already required to be paid by the person, firm or corporation generating the same within this State shall be allowed; Provided, further, that the provisions of this Act shall not apply to the electric power manufactured or generated in another State and brought into this State until such power has lost its interstate character and immunities: Provided, further, that the provisions of this Act shall not apply to any person, firm or corporation owning and operating an electric manufacturing or generating plant of ten horse power or less, nor shall the provisions of this Act apply to industrial plants manufacturing or generating power for its own use, or for use upon its own premises by its bona fide operatives or employees but the tax shall be paid upon so much thereof as may be sold to other than its employees: Provided, further, that the provisions of this Act shall not apply to municipalities manufacturing or generating electricity for the use of its customers.

* * * * * * *

"Section 6. For the year 1931 the revenue produced under this Act shall reduce the 1931 property levy for State purposes to the full amount raised under the terms of this Act: Provided, further, that for the year 1932 and thereafter, the revenue derived under the provisions of this Act shall be turned into the State Treasury for the support of the State Government."

The statute is attacked from different angles by the complainants in the various suits. The Broad River Power Company generates, sells and uses current within the state of South Carolina; and it attacks both the production and the sales tax of the statute as being violative of the due process and equal protection clauses of the 14th Amendment and similar provisions in the Constitution of South Carolina. The Lexington Power Company generates current within the state of South Carolina which is sold to another company and transmitted to other states; and it attacks the production tax as a burden upon interstate commerce as to current transmitted to other states, as well as being in violation of the 14th Amendment and similar provisions of the South Carolina Constitution. The South Carolina Power Company, in addition to generating and selling current within the state of South Carolina, brings [fol. 67] in from the state of Georgia current which it sells in South Carolina; and in addition to attacking both the generation tax and the sales tax under the 14th Amendment and the Constitution of South Carolina, it attacks the sales tax in so far as it affects electricity brought into the state for sale therein both as burdening interstate commerce and as discriminating against such commerce. The Lexington Power Company and the South Carolina Power Company, in addition to their other positions, contend that their power plants for the generation of electricity, which are maintained in navigable rivers under authority granted by the federal government, are agencies of the federal government in aid of navigation and are not subject to taxation at the hands of the state. The following questions, therefore, are raised by the cases before us:

(1) whether the statute violates the fundamental guaranties of due process and equal protection contained in the 14th Amendment and in the Constitution of South Carolina;

(2) whether it violates the Commerce Clause of the Constitution with respect to electric current generated within the state and transmitted to other states or with respect to current brought in from other states and sold within the state; and

(3) whether it constitutes a burden upon a means or agency of the federal government with respect to those companies which are maintaining power plants in navigable streams under authority given them by Congress and the Federal Power Commission. We shall consider these questions in the order named.

Questions Under the 14th Amendment and the Constitution of South Carolina

Complainants contend that the statute amounts to a denial of due process and equal protection: (1) because it does not tax generation of electricity by the use of oil or internal combustion engines and does not tax persons furnishing gas to the public for light, heat or power; (2) [fol. 68] because it exempts from its operation industrial plants generating power for their own use or the use of their employees, and municipalities generating electricity for the use of their customers; (3) because it exempts from the sales tax electric current upon which the generation tax has already been paid; (4) because it is said that the statute is indefinite and fails to provide means for determining the tax on current brought from without and sold within the state; and (5) because it is said that, as to the tax imposed for the year 1931, the statute taxes power companies for the benefit of persons paying the general property tax levied by the state of South Carolina. None of these positions, we think, can be sustained.

As to the failure to tax gas companies and the generation of electricity by oil or the use of internal combustion engines, it is elementary that, in levying a tax, a state need not cover the whole field of possible taxation, but that it may classify for that purpose so long as the classification has a reasonable basis. State Board of Tax Com'rs of Indiana v. Jackson, — U. S. —, 51 Sup. Ct. 540; Alward v. Johnson, — U. S. —, 51 Sup. Ct. 273; Brown, Forman Co. v. Kentucky, 217 U. S. 563; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232. If not palpably arbitrary the clas-

sification is valid. Metropolis Theater Co. v. Chicago, 228 U. S. 61, 62; Toyota v. Hawaii, 226 U. S. 184. And it is the duty of the court to sustain it if any state of facts can be conceived of upon which the classification may reasonably rest. Rast v. Van Deman, 240 U. S. 342; Wampler v. Lecompte, — U. S. —, 51 Sup. Ct. 92; State Board of Tax Commissioners of Indiana v. Jackson, supra, —U. S. —, 51 S. Ct. 540.

In the case last cited, which involved the Indiana chain store tax, the rule is thus stated by Mr. Justice Roberts:

[fol. 69] "The principles which govern the decision of this cause are well settled. The power of taxation is fundamental to the very existence of the government of the states. The restriction that it shall not be so exercised as to deny to any the equal protection of the laws does not compel the adoption of an iron rule of equal taxation, nor prevent variety or differences in taxation, or discretion in the selection of subjects, or the classification for taxation of properties, businesses, trades, callings, or occupations, Bell's Gap R. R. v. Pennsylvania, 134 U. S. 232, 10 S. Ct. 533, 33 L. Ed. 892; Southwestern Oil Co. v. Texas, 217 U. S. 114, 30 S. Ct. 496, 54 L. Ed. 688; Brown-Forman Co. v. Kentucky, 217 U. S. 563, 30 S. Ct. 578, 54 L. Ed. 883. The fact that a statute discriminates in favor of a certain class does not make it arbitrary, if the discrimination is founded upon a reasonable distinction, American Sugar Refining Co. v. Louisiana, 179 U. S. 89, 21 S. Ct. 43, 45 L. Ed. 102, or if any state of facts reasonably can be conceived to sustain it. Rast v. Van Deman, 240 U. S. 342, 36 S. Ct. 370, 374, 60 L. Ed. 679, L. R. A. 1917A, 421, Ann. Cas. 1917B, 455; Quong Wing v. Kirkendall, 223 U. S. 59, 32 S. Ct. 192, 56 L. Ed. 350. As was said in Brown-Forman Co. v. Kentucky, supra, at page 573 of 217 U. S., 30 S. Ct. 578, 580; 'A very wide discretion must be conceded to the legislative power of the state in the classification of trades, callings, businesses, or occupations which may be subjected to special forms of regulation or taxation through an excise or license tax. If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law.'"

The act before us cannot be said to be palpably arbitrary in that it does not tax the generation of electricity by the use of combustion engines, nor because it does not tax persons furnishing gas to the public for light, heat and power. The business of producing and selling gas is so fundamentally different from the generation of electric power, that to point out the difference which might furnish a basis for the taxation of one and not the other is clearly unnecessary. The same is true of the production of electric current by the use of oil or internal combustion engines. The record shows that only two very small plants in the state of South Carolina are engaged in producing electricity in this manner; and, if the legislature knew of their existence at all, it may well have determined that [fol. 70] the volume of their business was so small and their relative cost of production so great as to put them in a class entirely different from the great power companies producing current from water power and coal. The purpose of the legislature was evidently to tax the generation of electric current by the hydro-electric companies which utilize the water power in the rivers of South Carolina, one of the great natural resources of that state. The generation of current by the use of steam power was taxed because it is a matter of common knowledge that the hydro-electric companies use steam power to supplement water power in the production of their current and also because current produced by steam power is the great competing factor on the market with current produced by water power. In so far as companies producing electric current by means of internal combustion engines may sell the current produced, they are not exempted from the tax imposed by the statute, but are reached by the sales tax imposed by subsection (c) of section 1. We do not regard this, however, as a matter of importance in sustaining the tax imposed by subsections (a) and (b); for we are satisfied that the classification of companies producing electricity by water power and steam for purposes of taxation is a reasonable one which must be sustained.

In Quong Wing v. Kirkendall, 223 U. S. 59, a statute was sustained which imposed a tax on hand laundries, but did not apply to steam laundries, and excepted from its operation laundries not employing more than two women. In Cargill v. Minnesota, 180 U. S. 452, a statute was sustained

which required warehouses situate on the right of way of a railroad to secure a license from a state commission but made no such requirement of other warehouses. In Armour Packing Co. v. Lacy, 200 U. S. 226, an occupation tax was sustained upon meat-packing houses which distributed [fol. 71] their products from depots, although no such tax was imposed upon wholesalers and commission merchants. In Ohio River R. Co. v. Dittey (Ohio Tax Cases), 232 U. S. 576, an excise tax upon the gross earnings of railway companies was upheld, although no such tax was placed on the earnings of other public utilities. In Puget Sound Power Co. v. King Co., 264 U. S. 22, it was held that the property of a street railway company might be taxed upon a different basis from the property of steam railways. In Alaska Fish Salting Co. v. Smith, 255 U. S. 44, a tax was sustained upon the manufacture of fish oil, fertilizer and fish meal from herring, although at a greater rate than was imposed upon similar use of other fish. In Heisler v. Thomas Colliery Co., 260 U. S. 245, it was held that a tax on anthracite but not on bituminous coal did not violate the equal protection clause, and that the fact of commercial competition between the two did not prevent the state from classifying them separately for purposes of taxation. In the light of these decisions, a statute which taxes companies producing electric current by water power and steam without taxing gas companies and the comparatively insignificant companies which produce current by the use of internal combustion engines, cannot be said to make an arbitrary classification which denies the equal protection of the laws.

Like reasoning applies to the contention that the statute denies the equal protection guaranteed by the Amendment in that it exempts from the tax industrial plants generating power for the use of themselves and their employees, and municipalities generating electricity for the use of their customers. Such industrial plants and municipalities are manifestly in an entirely different class from power companies generating electricity for sale to the public. So far as the exemption extended to industrial plants is concerned, the case is clearly governed by American Sugar [fol. 72] Refining Co. v. Louisiana, 179 U. S. 89, which dealt with a statute imposing a license tax upon persons refining sugar and molasses, but exempting from the tax "planters

and farmers grinding their own sugar and molasses." In sustaining the constitutionality of the statute, the court, speaking through Mr. Justice Brown, said:

"The act in question does undoubtedly discriminate in favor of a certain class of refiners, but this discrimination, if founded upon a reasonable distinction in principle, is valid. Of course, if such discrimination were purely arbitrary, oppressive or capricious, and made to depend upon differences of color, race, nativity, religious opinions, political affiliations or other considerations having no possible connection with the duties of citizens as taxpayers, such exemption would be pure favoritism, and a denial of the equal protection of the laws to the less favored classes. But from time out of mind it has been the policy of this government, not only to classify for purposes of taxation, but to exempt producers from the taxation of the methods employed by them to put their products upon the market. The right to sell is clearly an incident to the right to manufacture or produce, and it is at least a question for the legislature to determine whether anything done to prepare a product most perfectly for the needs of the market shall not be treated as an incident to its growth or production."

Here the generation of electricity by manufacturers for the use of themselves and their employees is clearly no more than an incident of the business of manufacturing in which they are engaged and, both practically and theoretically, stands upon an entirely different footing from the generation of current for sale to the public. See also Armour & Co. v. Virginia, 246 U. S. 1, which sustained a taxing statute which imposed a tax on merchants based on the amount of their purchases, including as purchases all goods and merchandise manufactured by the licensee and sold or offered for sale within the state, but excluded from its operation domestic manufacturers, taxed on capital by the state, who offered for sale at the place of manufacture goods manufactured by themselves. In upholding this statute against the charge that it denied the equal protection guaranteed by the 14th Amendment, Chief Justice White said that the distinction upon which the classification of [fol. 73] the statute rested was so obvious as to require nothing more than a mere statement of the two classes. We think the same is true of the classification here.

So far as the exemption accorded municipalities is concerned, a municipality is an agency of the state, and its operations are conducted, not for private profit, but for the benefit of the public or its citizens. Irvine v. Town of Greenwood, 89 S. C. 511, 72 S. E. 228. Its property and business conducted by it are ordinarily not taxed at all; and legislation of the state taxing or exempting same from taxation is not open to the objection that it offends the equal protection clause of the 14th Amendment. See Hardwick v. Wolcott, 98 Vt. 343, 129 A. 159, 39 A. L. R. 1222 and note.

Our attention is called to section 4, article 10 of the Constitution of South Carolina, which provides that "there shall be exempted from taxation all county, township and municipal property used exclusively for public purposes and not for revenue"; and the argument is made that the legislature, because of this provision, is without power to exempt from taxation the business of a municipal lighting or power plant operated for revenue. The constitutional provision in question, however, merely requires that the legislature exempt from tax the property mentioned therein. There would seem to be nothing in it which would require the legislature to impose an excise tax on the business operated by municipalities; and in the absence of a holding of the Supreme Court of South Carolina to that effect we cannot give it such construction. As we said in Doscher v. Query, 21 Fed. (2d) 521, 528:

"The question as to whether the statute under consideration violates the Constitution of South Carolina has not been passed upon by the Supreme Court of that state; and federal courts are reluctant to adjudge a state statute to be in conflict with the state constitution before that question has been considered by the state tribunals, especially [fol. 74] where the statute is one affecting the revenues of the state. Michigan Cent. R. Co. v. Powers, 201 U. S. 245, 291, 26 S. Ct. 459, 50 L. Ed. 744; Coulter v. Louisville & Nashville R. Co., 196 U. S. 599, 609, 25 S. Ct. 342, 49 L. Ed. 615. They will not do so unless the case 'imperatively demands such a decision.' Louisville & N. R. Co. v. Garrett, 231 U. S. 298, 305, 34 S. Ct. 48, 51 (58 L. Ed. 229.)"

It is argued that the sales tax imposed by section (c) of the act violates the equal protection clause of the Federal

Constitution and also the rule of uniformity prescribed by article 10, section 1, of the Constitution of South Carolina, because it exempts from the tax sales of current upon which the generation tax has already been paid. We think, however, that this point is entirely without merit. The evident purpose of the act is to impose a tax upon the current used within the state and to impose it at the source or as soon as the current becomes subject to the jurisdiction of the taxing power, but not to impose it but once (Cf. Texas Co. v. Brown, 258 U. S. 466, 479). If current produced as well as sold within the state were subjected to the sales tax, such current would rest under a double burden of taxation. To avoid this and at the same time to preserve the system of taxing at the source, current which is produced within the state is taxed at the time of generation but is relieved of the sales tax, which is equal in amount, with the result that all current sold within the state, whether produced there or brought in from another state, pays exactly the same tax. If there is any discrimination, it is in favor of the current brought in; for such current does not pay tax upon the "line loss", whereas the generation tax does not make provision for this loss. The situation is precisely that with which the Supreme Court dealt in Hinson v. Lott, [fol. 75] 8 Wall. 148. In that case the state of Alabama had levied a tax of 50 cents per gallon on all spirituous liquors manufactured within the state. A subsequent section of the act provided that dealers introducing such liquors into the state should, before offering same for sale, pay a similar tax upon every gallon thereof. What the Supreme Court said in answer to the contention that this constituted a burden upon and a discrimination against interstate commerce as to the liquor brought in answers equally the contention here that the exemption in favor of the current upon which the tax has been paid discriminates against the current brought in upon which it has not been paid. Said the Court:

"A tax is imposed by the previous sections of the same act of fifty cents per gallon on all whiskey and all brandy from fruits manufactured in the State. In order to collect this tax, every distiller is compelled to take out a license and to make regular returns of the amount of distilled spirits manufactured by him. On this he pays fifty cents

per gallon. So that when we come in the light of these earlier sections of the act, to examine the 13th, 14th, and 15th sections, it is found that no greater tax is laid on liquors brought into the State than on those manufactured within it. And it is clear that whereas collecting the tax of the distiller was supposed to be the most expedient mode of securing its payment, as to liquors manufactured within the State, the tax on those who sold liquors brought in from other states was only the complementary provision necessary to make the tax equal on all liquors sold in the State. As the effect of the act is such as we have described, and it institutes no legislation which discriminates against the products of sister States, but merely subjects them to the same rate of taxation which similar articles pay that are manufactured within the State, we do not see in it an attempt to regulate commerce, but an appropriate and legitimate exercise of the taxing power of the States."

In Doscher v. Query, supra, 21 Fed. (2d) 521, we dealt with a statute of South Carolina imposing a stamp tax on the sale of tobacco products within the state and requiring the affixing of stamps by manufacturers, wholesalers and retailers, but providing that where stamps had been once affixed no further stamps should be required. The tax was [fol. 76] assailed, just as is the tax here, on the ground that it discriminated against unstamped products brought into the state in favor of products produced within the state upon which the stamp tax had been paid by the producer. And there, just as here, the tax was attacked as violative of article 10, section 1, of the South Carolina Constitution, and the decision in Standard Oil Co. v. Spartanburg 66 S. C. 37, 44 S. E. 377, was relied on. In upholding the validity of the statute, we said:

"It will be noted that the section (of the Constitution) relied on expressly authorizes graduated license taxes on occupations and business, and, if the tax in question be considered an occupation or business tax, graduation in accordance with sales would seem to be expressly authorized. If it be considered a tax on sales, there is nothing in the section of the Constitution to invalidate any of its provisions, as it is undoubtedly made at a uniform and equal rate, levying the same tax on all articles of mer-

chandise of the same sort sold within the state. The idea that the rule of uniformity is violated because only one tax is imposed on each article and only one stamp is required to be placed on it, even though it may have been sold a number of times, is not well grounded. It is a matter of common knowledge that a tax of this sort is shifted from dealer to dealer and is ultimately paid by the consumer, and we can think of no better way of securing uniformity in a sales tax than by imposing the tax on the article itself, as is in effect done in this case.

"The question here is very different from that involved in Standard Oil Co. v. Spartanburg, 66 S. C. 37, 44 S. E. 377, especially relied upon by complainants. There an ordinance of the city of Spartanburg imposed a flat license tax of $250.00 per year on dealers in oils, but exempted from paying the tax dealers handling oils on which the license had been paid. The Supreme Court of South Carolina held that the ordinance made an unreasonable classification, and was therefore void. But in that case the effect of the ordinance was to exempt from taxation dealers handling oils purchased from dealers who had themselves paid the flat license tax, the exemption applying not to the oil but to the dealer. Here no one is exempted from paying the tax imposed, but it is collected from the dealer or manufacturer who has the goods in possession prior to the first sale within the state. To provide that no one shall be required to pay an additional tax with respect to the sale of these particular goods, as to which we may safely assume that the tax paid is added to the price, is manifestly a very different thing from providing that retail dealers in oil shall be exempted from paying a [fol. 77] flat annual license tax because they happen to purchase from a wholesaler who has paid the same tax."

It is next argued by the complainant South Carolina Power Company that the statute deprives it of property without due process of law, in that it fails to provide any certain means for determining the tax on current brought into the state. The statute provides that it shall not apply to electric power generated in another state and brought into South Carolina until such power has lost its interstate character; and the objection is that no means is provided for determining when the current loses its interstate char-

acter and becomes subject to the tax. In the light of the evidence as to how current is brought into South Carolina by the South Carolina Power Company, however, this objection loses all substance. The current comes into South Carolina in interstate commerce on high tension wires at a voltage of 44,000 volts. All of it is used in South Carolina, but before it is used it is "stepped down" to a lower voltage and thus prepared for use in the state. As we shall show later, it loses its interstate character at this time. There is no difficulty in determining to a practical certainty how much current is thus "stepped down" and sold within the state of South Carolina, even though the high voltage current brought into the state is run over the same wires that carry the current produced in the state. The current generated in South Carolina by the South Carolina Power Company and the current sold by it in that state are measured by its electric meters with absolute accuracy; and the method adopted in computing the tax on current brought in and sold is to add the total kilowatt hours coming into South Carolina (37,450,000) to the number generated in South Carolina (40,000,000); and from this total (77,450,000) compute the line loss (14,760,339 or 19%). This percentage of loss is applied on the current [fol. 78] coming into the state which gives the line loss on this current (7,115,500). This is subtracted from the current brought into the state; and the result (30,334,500) represents the amount of current brought into the state and sold. It is objected that there is no average of transmission loss; but the method adopted would seem to be reasonably fair and accurate, as much so, at least, as most methods in use for computing taxes on the profits of business, which are universally upheld. If absolute accuracy in matters of this sort were necessary to the validity of taxes, most modern taxing systems would be found invalid.

Little need be said as to the point that the tax is levied for the benefit of private persons paying the general property tax in that the statute provides that the proceeds of the tax for the year 1931 shall go to reduce the property levy for that year. Every tax levied, in theory at least, reduces other taxes. When a part of the public revenue is collected from excises, a smaller amount is required from the tax on property; and whether the legislature, after providing for the collection of an excise, takes this into account

and prepares to balance the budget by levying a smaller tax on property, or whether, after making the levy on property, it provides that the revenue realized from an excise shall reduce that levy, is manifestly immaterial. In either event the amount raised by the excise is used for public purposes; and the fact that the property owner may have benefited by the levy of the excise because of the reduction of the taxes on property, is no more material in the one case than in the other. A tax cannot be said to be levied for the benefit of private persons simply because, on account of the revenue to be derived from same, the legislature has seen fit to lower the tax rate on their property. Whether a tax shall be raised or reduced, or whether revenue shall be raised [fol. 79] by one system or by another, are matters committed necessarily to the discretion of the legislature, with the exercise of which the courts cannot interfere.

Questions Under the Commerce Clause

The principal questions under the commerce clause of the Constitution are based upon what is said to be the inherent nature of the generation and transmission of electric power. It is said that only so much power is generated as is needed to supply the user; that the whole system is so connected and regulated that, whether produced by water power or by steam, the generators produce only so much current as is called for at any given time by the use made of the current by the customer; that electricity travels at the rate of light, i. e., at the rate of 186,000 miles per second, with the result that current is generated and transmitted instantaneously to the customer when he signifies his need of it by turning on his light, motor or other device using current; and that the transmission of current to the customer in interstate commerce must be treated, therefore, as generation and transmission in response to order, which the state cannot burden by taxation. The process of generation and transmission is thus described in the affidavit of Dr. Robert A. Millikan, one of the most distinguished physicists of the country:

"The terms 'generation,' 'manufacture' and 'production' as applied to energy in the electrical form are merely convenient designations applied to one aspect of the process of transferring energy from some source in nature (such as

falling water) to some point where it may be usefully applied. The various electrical facilities used in said process are purely transferring devices, and the entire combined process—electric, magnetic and mechanical—is integral, continuous and essentially simultaneous, as electricity travels approximately with the speed of light—186,000 miles per second.

"There is a continuous electrical and electromagnetic path between the windings in the generator and the windings in the consumer's motor (or between the generator windings and the filament in an electric lamp or the elec- [fol. 80] trodes in an electrochemical cell). The entire electric system is a device for transferring the force of the falling water to and applying it at the point where it is to be utilized. Except as, and to the extent that, energy is called for and used at the final point of utilization, the electric generator neither receives from the water wheel shaft nor delivers to the electric transmission lines any energy other than that necessary to hold the equipment under constant rotation and electric charge in instant readiness to serve.

* * * * * * *

"In the commercial generation, transmission and distribution of electricity the process is essentially unchanged. Electricity generated at different stations may, for commercial convenience, reliability of service, and similar factors, be brought together at a single distributing station or substation, as it is sometimes called, from which point it is in turn distributed over different lines to consumers' different points of use. If no consumer is using power on any distribution line no demand is placed on the generators and no electricity is generated, except as above stated, that necessary to hold the equipment under rotation and electric charge. If the aggregate electrical demand of the various consuming devices of the different consumers is less than the capacity of the generators, that part of the generating equipment which is not required to serve the immediate present combined demands of the various consumers remains idle, or delivers only such power or electricity as is required to meet the combined demands of the consumers. Similarly, meters placed at the generating station, or at any point between the generating station or stations and the

distributing substation, register the power output (subject to losses as they vary from point to point) required to meet the then total demands of all the consumers, and the duration of such aggregate total demands. They afford measurements of aggregate consumers' use as well as measurements of generation, because the two are correlative.

"The various processes involved in stepping up and stepping down electricity through transformers involve no change in the essential nature of the electrical processes herein first above mentioned. They are merely devices adapted to the needs of the particular situation developed primarily with a view to efficiency and economy in operation. For illustration, electricity could be generated at 6600 volts and economically transmitted from the station for a distance of a few miles, and used by a consumer whose motors operated at that voltage without any process of transformation at either end of the circuit. This would probably be done under such conditions of transmission and use. But as distances of transmission increase, transmission at such a relatively low voltage involves either ex- [Vol. 81] cessive size of conductors or excessive losses in transmission and the economic and practical thing to do is to step up the voltage (increase the pressure) for economy in transmission. The transformers, therefore, are merely an aid to the transfer or transmission of energy in the electrical form, or what we call electricity."

We think, however, that the argument of complainants ignores or at least does not accord sufficient importance to the part played by the transformer in the system of electrical transmission. Electricity is produced at a low voltage. For transmission over long distances it is "stepped up" by a transformer to a very high voltage; and all of the current transmitted in interstate commerce by complainants is thus "stepped up" before transmission in such commerce. Before it can be used by the consumer it must be "stepped down" again to a low voltage; and all of the current received by complainants in interstate commerce is thus stepped down before being sold to or used by the consumer. And this "stepping up" or "stepping down" is not a mere change produced in the current. It is the production of a new and different current. The principle of the transformer is that the current flowing in the wires

coming into the transformer sets up an induced current in the magnetic core of the transformer and this causes an induced current to flow in the wires going out of the transformer, the voltage depending upon the relative number of coils of the wires carrying the current in and those carrying the induced current out. These wires are insulated from each other, and the current going out is not the current coming in, but a new and different current, although induced by the former. Encyclopedia Britannica, 14th Ed., Article "Transformers". The current produced by induction in the transformer results from the use of the original current but is not that current, just as current produced by steam [fol. 82] results from the use of coal but is not the coal.

Now, so far as the production or generation tax on current is concerned, there can be no question as to its validity as applied to current transmitted in interstate commerce, we think, even though the current transmitted be conceived of as the identical current produced. The production of an article for transmission in interstate commerce is not in itself such commerce. Leather Workers v. Herkert, 265 U. S. 457; United Mine Workers v. Coronado Co., 259 U. S. 344; D., L. & W. R. R. v. Yurkonis, 238 U. S. 439. And there can be no question but that such production is taxable by the state.

In Oliver Iron Co. v. Lord, 262 U. S. 172, the state of Minnesota had imposed a tax on the business of mining iron ore measured by a percentage of the value of the ore mined or produced. Substantially all of the ore when mined was loaded on cars and shipped into other states to satisfy existing contracts. In holding that the tax on production was not a burden on interstate commerce, though the ore was destined for transportation in such commerce even before it was mined, the court, speaking through Mr. Justice Van Devanter, said:

"The ore does not enter interstate commerce until after the mining is done, and the tax is imposed only in respect of the mining. No discrimination against interstate commerce is involved. The tax may indirectly and incidentally effect such commerce, just as any taxation of railroad and telegraph lines does, but this is not a forbidden burden or interference."

The same holding has been made with respect to the production tax on gas (Hope Natural Gas Co. v. Hall, 274

U. S. 284); a tax on coal prepared and "ready for shipment or market" and destined for a market in other states (Heisler v. Thomas Colliery Co., supra); and a manufacturing tax upon goods sold in interstate commerce (American Mfg. Co. v. St. Louis, 250 U. S. 459).

[fol. 83] The case of Hope Gas Co. v. Hall, supra, supporting the production tax on gas, would seem to be directly in point as supporting the tax here; for the gas in that case, just as the electricity here, was transmitted immediately in interstate commerce. The fact that the gas went through pipes, whereas the electric energy is transmitted by wires, or that a longer time is required for the transmission of gas than is required for the transmission of electricity, or that gas is a material which is understood whereas electricity is a force which is not understood, would seem to make no difference with respect to the principal involved.

As pointed out above, however, it clearly appears that the current generated in South Carolina, upon which the tax is imposed, is not the current transmitted in interstate commerce. The current upon which the tax is imposed is the generated low voltage current; the current transmitted in interstate commerce is the high voltage current induced in the transformers of the company. The statute does not attempt to impose a tax upon this.

And we think it equally clear that the tax imposed upon the sale of current does not burden interstate commerce as to current brought from without the state. The tax is not imposed on the high voltage current which passes in interstate commerce. It is imposed on the low voltage current which is sold to the consumer, and is an excise tax on the business of selling that current. The high voltage current which comes into the state is not sold. It is used to induce in the transformer the low voltage current which is sold. Even if the current sold be considered as the current which is brought in, it has gone through a process in which it has been "broken up" or changed from one current of high voltage to many currents of low voltage; and [fol. 84] it is these many currents of low voltage sold within the state upon the sale of which the tax is levied. While electric current can hardly be said to "come to rest" within a state, its interstate journey ends at the transformer which uses it for the production of low voltage currents for use

within the state. The situation is the same in principle as the breaking up of an original package after shipment in interstate commerce (cf. Brown v. Maryland, 12 Wheat. 419, 443), or the breaking up of a cargo of oil after its interstate journey and the sending of it in tank cars to the points where needed within the state (A. C. L. R. Co. v. Standard Oil Co., 275 U. S. 257; A. C. L. R. Co. v. Standard Oil Co. (C. C. A. 4th), 12 Fed. (2d) 541), or the distribution of gas in low pressure pipes after it has been brought into the state in high pressure pipes in interstate commerce. East Ohio Gas Co. v. Tax Commission of Ohio, — U. S. —, 51 Sup. Ct. 499.

The case last cited is directly in point. There the state of Ohio had imposed a tax on the sale of gas within the state. A company brought in gas from other states in high pressure pipe lines. From these lines it was distributed to consumers by means of low pressure supply mains. The reduction of the current of gas from high pressure to low pressure for local use, while different mechanically, is the same from the standpoint of legal principle as the reduction of a high voltage current to low voltage for local use. In sustaining the right of the state to impose the tax, the Supreme Court, speaking through Mr. Justice Butler, said:

"The transportation of gas from wells outside Ohio by the lines of the producing companies to the state line and thence by means of appellant's high pressure transmission lines to their connection with its local systems is essentially national—not local—in character and is interstate commerce within as well as without that state. * * * But when the gas passes from the distribution lines into the supply [fol. 85] mains, it necessarily is relieved of nearly all the pressure put upon it at the stations of the producing companies, its volume thereby is expanded to many times what it was while in the high pressure interstate transmission lines, and it is divided into the many thousand relatively tiny streams that enter the small service lines connecting such mains with the pipes on the consumers' premises. So segregated the gas in such service lines and pipes remains in readiness or moves forward to serve as needed. The treatment and division of the large compressed volume of gas is like the breaking of an original package, after shipment in interstate commerce, in order that its contents may be treated, prepared for sale and sold at retail. State v.

Flannelly 96 Kan. 372, 383-384, 152 P. 22; W. Va. & Md. Gas Co. v. Public S. Com., 134 Md. 137, 143-145, 106 A. 265; Cf. Atlantic Coast Line v. Standard Oil Co., 275 U. S. 257, 269, 48 S. Ct. 107, 72 L. Ed. 270; Brown v. Maryland, 12 Wheat. 419, 6 L. Ed. 678; Leisy v. Hardin, 135 U. S. 100, 10 S. Ct. 681, 34 L. Ed. 128. It follows that the furnishing of gas to consumers in Ohio municipalities by means of distribution plants to supply the gas suitably for the service for which it is intended is not interstate commerce, but a business of purely local concern exclusively within the jurisdiction of the state."

The point that the tax on sales is a discrimination against current which has passed in interstate commerce because current which has paid the local generation tax is exempted from the sales tax, has already been considered in discussing the points raised under the 14th Amendment. The cases of Hinson v. Lott, supra, 8 Wall. 148, and Doscher v. Query, supra, 21 Fed. (2d) 521, 525, sufficiently answer this position.

The Question of Federal Agency

The South Carolina Power Company generates at its Stevens Creek plant on the Savannah River the electric current which it brings into the state of South Carolina; and it argues that in maintaining the dam and plant at which the current is generated it is acting as an agency of the federal government in aid of navigation and is not taxable by the state upon the generation or sale of the current there produced. The same point is made by the Lexington Power Company, the plant of which is maintained upon the Saluda [fol. 86] River. Both rivers are navigable streams and both plants were constructed under licenses from the federal government, license being granted to the South Carolina Power Company by certain acts of Congress and to the Lexington Power Company by the Federal Power Commission. Both companies point, just as did the Susquehanna Power Company in the case recently decided by the Supreme Court (51 Sup. Ct. 434) to the licenses granted them by the Federal government, to the fact that their plants were constructed in accordance with plans required under their license and approved by officials of the government, to the provisions of law subjecting them to regulatory and supervisory powers

of the government extending to construction, maintenance, operation, financing, rates, service and accounting, and to the right of the government at the expiration of the license to take over and operate the property upon the payment of just compensation.

We cannot accept this contention. Complainants, in the production and sale of power, are not acting as agents of the government, but are engaged in private business for profit. To obtain licenses to build their dams in navigable streams, they have, it is true, consented to certain restrictions and conditions imposed by the government; but it does not follow that because of this they have made the private business in which they are engaged an instrumentality of the federal government and thus exempted it from taxation by the state. If a private business conducted for profit is to be exempted from taxation by one of our dual sovereignties because enjoying privileges granted subject to conditions by the other, most public service corporations would be able to escape either state or federal taxation. One had as well argue that a corporation enjoying the right of eminent domain under grant from the state is an agency of the state, and therefore not taxable by the federal government, as that [fol. 87] a corporation holding a license to build a dam in a navigable stream is for that reason an agency of the federal government and not taxable by the state. It is unthinkable that corporations of a state, carrying on private business protected by its laws, should escape the payment of excise taxes imposed upon such business, merely because they enjoy a license from the federal government which authorizes them to use the navigable streams of the state.

If this were an attempt to tax the license granted by the federal government, to discriminate in taxation against companies holding a federal license, or to tax a structure erected in aid of navigation, a different question would, of course, be presented; but nothing of the sort is involved in the case. We have simply the taxation of the private business done by the company which falls upon it in the same manner as upon other companies engaged in like business whether they are licensed to make use of the navigable streams of the state or not. See 6 R. C. L. 105-107; Thompson v. Pacific Railroad, 9 Wall. 579; Henderson Bridge Co. v. Kentucky,

166 U. S. 150, 154; Baltimore Shipbuilding Co. v. Baltimore, 195 U. S. 375; Gromer v. Standard Dredging Co., 224 U. S. 362; Susquehanna Power Co. v. State of Maryland, supra, — U. S. —, 51 Sup. Ct. 434. In the case last cited the Supreme Court, speaking through Mr. Justice Stone, laid down the principles which we think applicable here as follows:

"Assuming, for present purposes, that the license of the Power Commission is a federal instrumentality, immune from taxation or other direct interference by the state, it does not follow that the property appellant uses in its power project is clothed with that immunity. The exemption of an instrumentality of one government from taxation by the other must be given such a practical construction as will not unduly impair the taxing power of the one or the appropriate exercise of its functions by the other. Metcalf & Eddy v. Mitchell, 269 U. S. 514, 523, 524, 46 S. Ct. 172, 70 L. Ed. 384. [fol. 88] "With that end in view, the distinction has long been taken between a privilege or franchise granted by the government to a private corporation in order to effect some governmental purpose, and the property employed by the grantee in the exercise of the privilege, but for private business advantage. The distinction was pointed out by Chief Justice Marshall in McCulloch v. Maryland, 4 Wheat. 316, 436, 4 L. Ed. 579, and in Osborn v. Bank, 9 Wheat. 738, 867, 6 L. Ed. 204; see Union Pac. Railroad Co. v. Peniston, 18 Wall. 5, 34-37, 21 L. Ed. 787. It has been followed without departure, and property so owned and used has uniformly been held to be subject to state taxation."

Complainants attempt to distinguish the Susquehanna Power case on the ground that the tax there involved was a tax on property and not an excise tax on business. We think, however, that this is a distinction without a difference. An excise tax on production or sales is in effect a tax on the property produced or sold. Kehrer v. Stewart, 197 U. S. 60; Welton v. Missouri, 91 U. S. 275. And if the state may tax the property of the company used in the production or sale of electric current, there is no reason why it may not tax the current itself or, what is the same thing, its production and sale; for one tax is as much a burden upon what is said to be an agency of the government as the other. Mr. Justice Stone says, in the Susquehanna case,

"the distinction has long been taken between a privilege or franchise granted by the government to a private corporation in order to effect some governmental purpose, and the property employed by the grantee in the exercise of the privilege, but for private business advantage"; and the same distinction in principle exists here between the privilege or franchise granted by the government, i. e. the right to erect a dam in a navigable stream, and the business carried on by the grantee for private advantage, i. e. the production and sale of electric current.

[fol. 89] A point raised by the pleadings, but not stressed in the briefs, is that because of the franchise and income taxes already imposed by the state of South Carolina upon complainants, the tax in question violates the contract clause of the Constitution of the United States (Art. 1 sec. 10) and section 8 of Article 1 of the Constitution of South Carolina. It is clear, however, that the taxing power of the state was not exhausted by the imposition of the taxes referred to; and the taxing of the business of complainants by the act here in question impaired the obligation of no contract existing between the state and complainants. See Citizens Savings Bank v. Owensboro, 173 U. S. 636, and cases there cited.

For the reasons stated, we think that the interlocutory injunction prayed for must be denied. We have been impressed with the earnest argument of counsel, who point to the heavy taxes already required of them, and complain that the statute here will add a grievous burden to their load. This, however, is a matter for the Legislature of the state and not for us. We can grant relief from a taxing statute only when it offends some constitutional provision; and, for the reasons stated, we cannot say that the statute here under consideration so offends.

Interlocutory Injunction Denied.

We concur.

John J. Parker, U. S. Circuit Judge, 4th Judicial Circuit. Elliott Northcott, U. S. Circuit Judge, 4th Judicial Circuit. Ernest F. Cochran, U. S. District Judge, Eastern District S. C.

[fol. 90] IN UNITED STATES DISTRICT COURT

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed Sept. 7, 1931

In the above entitled cause the Court, after considering the pleadings and affidavits and hearing arguments of counsel on motion for interlocutory injunction, finds the following facts:

1. That complainant is a corporation duly created and existing under and by virtue of the laws of the State of South Carolina.

2. That defendants Walter G. Query, J. P. Derham and Frank C. Robinson are citizens and residents of the state of South Carolina and are members of the Tax Commission of said State.

3. That the amount in controversy in the suit, exclusive of interest and costs, exceeds the sum or value of $3,000.00.

4. That the Legislature of South Carolina, at the session for the year 1931, enacted a revenue statute, approved the 9th day of May 1931 and entitled "An Act to Raise Revenue for the Support of the State Government by the Imposition of an Excise Tax upon Electric Power Generated and Sold Within This State", which statute is set forth in full as an exhibit to the bill of complaint; and that this suit is instituted by complainant to enjoin the defendants as members of the Tax Commission of the State of South Carolina from enforcing against it the provisions of said act and collecting from it the taxes therein imposed, on the ground that said act violates certain provisions of the Constitution of the United States and certain provisions of the Constitution of the State of South Carolina.

5. That if the said tax were unconstitutional, as alleged, complainant would be without an adequate remedy at law [fol. 91] for the reason that the act requires that controverted taxes due under the act must be paid monthly and, if paid under protest, suit for recovery of same be instituted not later than thirty days thereafter, so that a multiplicity of suits would necessarily result were complainant to attempt to pay the taxes imposed by the act and recover same in an action at law.

6. That complainant is engaged in the generation of electric current by means of water power at its plant on the Saluda River in the State of South Carolina, all of which power it sells to other companies; that complainant will produce during the year 1931 approximately 300,000,000 kilowatt hours of current and that the tax thereon for the year commencing May 30, 1931, will amount to approximately $150,000.00.

7. That complainant does not bring electric current into South Carolina from without the state and makes no sale of current for use within the State of South Carolina, but all the current produced by it is sold to other power companies and after being "stepped up" to a higher voltage is transmitted to other states.

8. That the current produced by complainant upon which the production tax is imposed is produced at a low voltage, but by means of transformers an induced current of very high voltage is produced, and it is this induced current which is sold to other companies and transmitted in interstate commerce to other states.

9. That the State of South Carolina does not impose a tax upon gas companies nor upon companies generating electric current by the use of oils or combustion engines, although current sold by such companies would be subject to the sales tax imposed by subsection 3 of section 1 of the statute aforesaid; that there are shown to be at least two plants in the state of South Carolina producing electric current by the use of internal combustion engines, but these plants are shown to be small and the business done by them to be comparatively insignificant.

10. That there are a number of industrial plants in the state of South Carolina manufacturing and generating power for the use of themselves and their employees, and [fol. 92] there are a number of municipalities in the State of South Carolina generating electricity for the use of their customers.

11. That electricity is brought into South Carolina from other states and sold and the current so sold is subjected to the sales tax imposed by subsection (c) of section 1 of the act, whereas electric current generated within the state

upon which the generation tax has been paid is not subject to such sales tax.

12. That complainant's plant was built upon the Saluda River, one of the navigable streams within the state of South Carolina, under license issued to it by the Federal Water Power Commission, a copy of which license is attached to the bill of complaint and marked exhibit B.

Conclusions of Law

Upon the foregoing findings of fact, the Court concludes as a matter of law:

1. That the statute does not deny to complainant due process of law or the equal protection of the laws in violation of the Constitution of the United States because gas companies are not taxed nor because the tax is not imposed upon the production of electricity by the use of oil or internal combustion engines.

2. That the statute does not deny to complainant due process of law or the equal protection of the laws because it exempts from the tax industrial plants generating power for their own use or the use of their employees, and municipalities generating power for the use of their customers.

3. That the statute does not deny to complainant the equal protection of the laws because it exempts from the sales tax electric current upon which the generation tax has already been paid.

4. That the statute does not deprive complainant of property without due process of law because of the provision that the revenue produced for the year 1931 shall reduce the 1931 property levy for state purposes to the full amount raised under the statute.

5. That the statute does not violate section 4 of article 10 of the Constitution of South Carolina in that it exempts municipalities from the terms of the act.

[fol. 93] 6. That the statute does not violate section 3 of article 10 of the Constitution of South Carolina in providing that the revenue produced under the act for the year 1931 shall reduce the 1931 property levy by the full amount raised under the terms of the Act.

7. That the statute does not burden interstate commerce as to the electricity generated by complainant because the tax is placed upon the generation and not upon the transmission in interstate commerce and also because the current transmitted in interstate commerce is the high voltage current induced in the transformer and not the low voltage current upon which the generation tax is imposed.

8. That the tax imposed upon complainant does not constitute a burden upon an agency of the federal government.

9. That the statute, by imposing the tax in question, does not violate the Commerce Clause of the Constitution, nor article 1, section 8, of the Constitution of South Carolina.

10. That the Statute in question is valid and violates no provision of the Constitution of the United States or of the Constitution of South Carolina.

11. That complainant is not entitled to the interlocutory injunction prayed.

This the 7th day of September, 1931.

John J. Parker, United States Circuit Judge, Fourth Judicial Circuit. Elliott Northcott, United States Circuit Judge, Fourth Judicial Circuit. Ernest F. Cochran, United States District Judge, Eastern District of South Carolina.

[fol. 94] In United States District Court for the Eastern District of South Carolina

Lexington Water Power Company, Complainant,

versus

Walter G. Query, J. P. Derham, and Frank C. Robinson, as Members of and Constituting South Carolina Tax Commission, Defendants

Decree Denying Interlocutory Injunction—Filed Sept. 7, 1931

This cause coming on to be heard on application of complainant for interlocutory injunction before the under-

signed, constituting a court of three judges convened pursuant to Section 266 of the Judicial Code, and being heard upon the bill, answer, affidavits and arguments of counsel; and the Court having made and filed its findings of fact and conclusions of law as required by the equity rule of the Supreme Court, and being of opinion for the reasons herein stated, and more fully set forth in the written opinion filed herewith, that complainant is not entitled to the interlocutory injunction prayed:

Now, therefore, it is Ordered and Decreed that the interlocutory injunction prayed for be, and the same is hereby, denied; and it is further ordered that the temporary restraining order heretofore granted be dissolved, provided, however, that the said temporary restraining order shall be continued in force for thirty days from this date for the purpose of preserving the status quo until the complainant shall have had opportunity to determine whether it will appeal to the Supreme Court and to take such steps as may be necessary and proper for the preservation of its rights pending appeal.

And this cause is retained for further orders.

This the 7th day of September, 1931.

John J. Parker, United States Circuit Judge, Fourth Judicial Circuit. Elliott Northcott, United States Circuit Judge, Fourth Judicial Circuit. Ernest F. Cochran, United States District Judge, Eastern District of South Carolina.

[fol. 95] IN UNITED STATES DISTRICT COURT

STIPULATION AND AGREEMENT OF COUNSEL AS TO RECORD—
Filed May 16, 1932

For the purpose of a final hearing by the three judge Statutory Court it is stipulated and agreed between counsel for the parties the court shall consider as testimony before it on such final hearing the entire record in this cause which was before the court at the Asheville hearing on application for interlocutory injunction.

It is further stipulated and agreed by and between counsel for the parties hereto that the "Findings of Fact" herein filed 7th September, 1931, and appearing at pages

68, 69 and 70 of the printed transcript of record hereto attached shall, subject to the court's approval be modified in the following particulars:

Amend findings of fact numbered six, seven and eight so that as amended they shall read as follows:

"6. That complainant is engaged in the generation of electric current by means of water power at its plant on the Saluda River in the State of South Carolina, all of which power, except power consumed in station uses, it sells to other companies which companies receive it on the premises of complainant at its power plant; that during the year 1931 complainant produced approximately 183,000,000 kilowatt hours of current, and that the tax thereon amounts to approximately $91,500.00.

"7. That complainant does not bring electric current into South Carolina from without the State but all the current produced by it, except power consumed in station uses, is sold to other power companies and after being [fol. 96] 'stepped up' to a higher voltage is transmitted and used in South Carolina and other states.

"8. The current produced by complainant upon which the production tax is imposed is produced at 13,800 volts, and at this voltage may be measured in kilowatt hours, but by means of transformers an induced current of approximately 114,000 volts is produced and it is this induced current which is sold to other companies."

Add to paragraph 12 the following:

"Saluda dam of Lexington Power Company as now constructed prevents the passage of any water craft from a point below the dam to a point above the dam and vice versa."

If all the above amendments are not fully sustained by the record it is nevertheless agreed by counsel that such amendments are facts and may be considered by the court as such and as if testified to in open court without contradiction.

Agreed to this 21 day of April, A. D. 1932.

J. Fraser Lyon, Attorney for Defendants. W. C. McLain, Attorney for Complainant.

Dated 21st April, A. D. 1932.

[fol. 97] IN UNITED STATES DISTRICT COURT

STIPULATION AND AGREEMENT AS TO HEARINGS—Filed May 16, 1932

It is stipulated and agreed by and between Counsel for the parties hereto:

1. That the final hearings on applications for permanent injunctions shall be heard by the three judge Statutory Court in the City of Asheville, North Carolina, on the 13th day of June 1932 or at such other time as the Court may be called together for said hearing.

2. That said final hearings shall be upon an agreed statement of facts incorporated in stipulations and agreements of counsel dated 21st April 1932 and May 9th 1932.

3. That the Court in its final orders make provisions for time for any party to perfect an appeal to the United States Supreme Court upon giving supersedeas bond in an amount to be agreed upon by counsel for the parties.

This stipulation is not intended to preclude the Court from finding such other and additional facts as may be revealed by the record herein.

J. Fraser Lyon, Attorney for Defendants. Hagood, Rivers & Young, M. Rutledge Rivers, Attorney for South Carolina Power Company. W. C. McLain, Attorney for Broad River Power Company. W. C. McLain, Attorney for Lexington Water Power Company.

Dated May 11th, A. D. 1932.

[fol. 98] IN UNITED STATES DISTRICT COURT

ORDER CALLING TOGETHER THREE-JUDGE COURT—Filed May 16, 1932

The plaintiff brought this suit for a permanent injunction. An application was made for an interlocutory injunction, which was pressed to a hearing and decision before three Judges under the provisions of Section 266 Judicial Code

(U. S. Code, Title 28, Section 380). The case now comes up for final hearing on the merits, which must, under said provisions of law, be heard before three Judges. The counsel representing all parties have stipulated that the *hearing on the* final hearing on the merits be at Asheville, N. C. It is therefore

Ordered that Hon. John J. Parker, U. S. Circuit Judge, and Hon. Elliott Northcott, U. S. Circuit Judge, be and they are hereby called to the assistance of the undersigned, Hon. Ernest F. Cochran, District Judge; and the court as thus constituted be the court to hear and determine the said suit for a permanent injunction. It is further

Ordered that the final hearing on the merits for a permanent injunction herein be and the same is hereby set down for hearing before said three Judges as required by law at Asheville, N. C. on Monday, June 13, 1932, at ten o'clock A. M. It is further

Ordered that the Clerk of this Court or one of his deputies do attend this hearing at said time and place, and bring with him the entire record in this case.

Ernest F. Cochran, U. S. District Judge.

May 16th, 1932.

[fol. 99] In United States District Court

Opinion—Filed July 21, 1932

Parker, Circuit Judge:

These cases were before us some months ago on applications for interlocutory injunctions; and the legal questions involved were carefully considered at that time. See 52 Fed. (2d) 515. These orders denying interlocutory injunctions were affirmed on appeal to the Supreme Court. — U. S. —, 52 Sup. Ct. Rep. 494. On final hearing the facts have been stipulated; and, in our opinion, they are not materially different from the facts as found on the applications for interlocutory injunctions. No extended discussion of the case is, therefore, required. For the reasons stated in our original opinion, we think that we should deny the injunctions prayed and dismiss the bills. So far as the questions raised under the Commerce Clause of the Constitution

are concerned, we are fortified in our conclusion by the recent decision of the Supreme Court in the case of Utah Power & Light Co. v. Pfost, — U. S. —, 52 Sup. Ct. Rep. 548.

We desire to notice one question raised on the final hearing of the South Carolina Power Company's case which was not raised on the application for interlocutory injunction. This question relates to the tax on so much of its current as is sold to the Seminole, Aiken, Langley and Graniteville Mfg. Co. mil-s and to the towns of McCormick and Bamberg. With respect to the current sold to the mills, it appears that this is supplied to them by wires connecting with the wires of the power company carrying high voltage current from its Stevens Creek plant. Wires from the high tension wires run to transformers owned by the mills; and the current is there stepped down and measured on the low voltage side of the transformers. In the case of the town of McCormick, a high voltage transmission line delivers current to it from the Stevens Creek plant. Before reaching McCormick, however, this line delivers current, with voltage reduced through transformers, to consumers [fol. 100] in four municipalities. The twn of McCormick receives the current at the high voltage, reduces it, and sells it to consumers. In the case of the town of Bamberg, the voltage of the current is reduced by the company, but the current is sold by the town to the ultimate consumers.

We do not think that any of these special circumstances bring the current sold under the protection of the Commerce Clause of the Constitution. The power company is engaged in selling current locally within the state of South Carolina; and the tax complained of is imposed on sales in the course of this business. Of course, the state may not tax the interstate transmission or sale of electricity; but after the interstate journey of the current is ended and it becomes mingled with the current which the power company distributes and sells within the state, its sale unquestionably becomes subject to taxation by the state. The power company has a great system of lines within the state of South Carolina for the transmission and sale of electric current; and, when the current brought in from without the state reaches the lines used for this purpose, its interstate character is ended and it becomes subject to tax in the same manner as current produced within the state.

The bill of complaint of the power company shows that there is an inextricable intermingling on its transmission

lines of the current brought from without and that produced within the state. In one place in the bill it is said: "The electrical energy brought from the state of Georgia and the electrical energy generated in complainant's steam plant in Charleston are fed into the interconnected transmission system of the complainant, the meeting point of these two sources of supply being indefinite and changing from instant to instant." And at another place it is said: "The demands of complainant's various customers in South Carolina occur on various transmission and distri- [fol. 101] bution lines in such state, and these demands are supplied from the generating plants at Charleston, South Carolina, and Stevens Creek, Georgia (except that in the case of deficiency of flow in the Savannah River this demand to the extent of such deficiency is supplied from the system of the Georgia Power Company). There is thus created a continuing, combined demand on those two generating plants located in different states which exists throughout the entire interstate system." Certainly, if these allegations are accepted, there can be no question as to the power of the state to tax the local sales of current made from its current carried on its local distribution lines, which is the joint product of manufacture within and without the state; for such current has thus become mingled, as it were, with the mass of property within the state, and as such is subject to state taxation. Askern v. Continental Oil Co., 252 U. S. 444; General Oil Co. v. Crain, 209 U. S. 211.

It is said, however, that notwithstanding the allegations of the bill, we should find that the current supplied to the town of McCormick is carried by a line not connected with any producing plant in South Carolina, and is therefore not mingled with any current produced within the state, and that the mills, while on a line connected with the producing plant at Charleston, S. C., are not reached by the current produced at that point. Even if this be assumed, we do not think that the position of the power company is helped. The fact remains that the lines which supply the town of McCormick and the mills in question are lines maintained for the local distribution and sale of electric current; and when current brought in from another state is placed on these lines for local distribuation and sale, it loses its interstate character. And it makes no difference that delivery

is made to the local customer at high voltage. The quan-
[fol. 102] tity of current is measured not in volts but in amperes; and when current is drawn off the lines, the "original package" is broken and the amperage remaining on the lines is reduced. The line to McCormick, for instance, carries the current which the power company uses to supply its customers in Merriwether, Modoc, Parksville and Plum Branch. The current which the line carries is broken up for sale to these various users and the town of McCormick obtains only a part of the current carried on the line. The situation presented is not different in principle from that of a dealer who brings into the state a cargo of fertilizer in bulk and sells it partly at wholesale and partly at retail. No one would question the power of the state to tax the business of such dealer.

The case of State Tax Commission of Mississippi v. Interstate Natural Gas Co., — U. S. —, 52 Sup. Ct. Rep. 62, upon which the power company particularly relies, is not in point. In that case, the company upon which the tax was levied was not engaged in business in the state which proposed to levy the tax. It merely sold natural gas which it had transported from another state to a local distributing company. Here not only is the power company engaged in the business of selling electric current locally, but the current sold to all of its customers is drawn from the lines which it uses for the purpose of carrying on the business of local distribution and sale.

There is no escaping the fact that the business of the South Carolina Power Company is primarily local in character. Its system of lines is used for the distribution and sale of electricity within the state of South Carolina. As stated above, a large part of the electric current distributed and sold by it is produced within the state, and the part brought from without the state is handled over the local distribution system and is distributed and sold locally. As [fol. 103] said by the Supreme Court in Missouri v. Kansas Gas Co., 265 U. S. 298, 309, with respect to the distribution and sale of natural gas:

"The business of supplying, on demand, local consumers is a local business, even though the gas be brought from another State and drawn for distribution directly from interstate mains; and this is so whether the local distribu-

tion be made by the transporting company or by independent distributing companies. In such case the local interest is paramount, and the interference with interstate commerce, if any, indirect and of minor importance."

The case cannot be distinguished in principle, we think, from East Ohio Gas Co. v. Tax Com. of Ohio, 283 U. S. 465. The tax complained of is levied not on sales made in carrying on commerce between the states, but on sales made in the operation of a local distribution system. It is immaterial that a part of the electrical energy used by such system is obtained from without the state; and it is likewise immaterial that distribution is made to some customers at a high voltage.

In all three cases, the prayers for permanent injunction will be denied and the bills will be dismissed.

Injunction denied and bills dismissed.

We concur.

John J. Parker, U. S. Circuit Judge. Ernest F. Cochran, U. S. District Judge.

See Judge Northcott's concurrence.

[fol. 104] IN UNITED STATES DISTRICT COURT

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed July 21, 1932

In the above entitled cause the Court, after considering the pleadings, affidavits and stipulation of the parties as to the facts, and hearing arguments of counsel on motion for interlocutory injunction, finds the following facts:

1. That complainant is a corporation duly created and existing under and by virtue of the laws of the State of South Carolina.

2. That defendants Walter G. Query, J. P. Derham and Frank C. Robinson are citizens and residents of the state of South Carolina and are members of the Tax Commission of said State.

3. That the amount in controversy in the suit, exclusive of interest and costs, exceeds the sum or value of $3,000.00.

4. That the Legislature of South Carolina, at the session of the year 1931, enacted a revenue statute, approved the 9th day of May, 1931, and entitled "An Act to Raise Revenue for the Support of the State Government by the Imposition of an Excise Tax upon Electric Power Generated and Sold Within This State", which statute is set forth in full as an exhibit to the bill of complaint; and that this suit is instituted by complainant to enjoin the defendants as members of the Tax Commission of the State of South Carolina from enforcing against it the provisions of said act and [fol. 105] collecting from it the taxes therein imposed, on the ground that said act violates certain provisions of the Constitution of the United States and certain provisions of the Constitution of the State of South Carolina.

5. That if the said tax were unconstitutional, as alleged, complainant would be without an adequate remedy at law for the reason that the act requires that controverted taxes due under the act must be paid monthly and, if paid under protest, suit for recovery of same be instituted not later than thirty days thereafter, so that a multiplicity of suits would necessarily result were complainant to attempt to pay the taxes imposed by the act and recover same in an action at law.

6. That complainant is engaged in the generation of electric current by means of water power at its plant on the Saluda river in the State of South Carolina, all of which power, except power consumed in station uses, it sells to other companies which companies receive it on the premises of complainant at its power plant; that during the year 1931 complainant produced approximately 183,000,000 kilowatt hours of current, and that the tax thereon amounts to approximately $91,500.00.

7. That complainant does not bring electric current into South Carolina from without the State, but all the current produced by it, except power consumed in station uses, is sold to other power companies and after being "stepped up" to a higher voltage is transmitted and used in South Carolina and other states.

8. The current produced by complainant upon which the production tax is imposed is produced at 13,800 volts, and at this voltage may be measured in kilowatt hours, but by means of transformers an induced current of approximately 114,000 volts is produced and it is this induced current which is sold to other companies.

9. That the State of South Carolina does not impose a tax upon gas companies nor upon companies generating [fol. 106] electric current by the use of oil or combustion engines, although current sold by such companies would be subject to the sales tax imposed by subsection 3 of section 1 of the statute aforesaid; that there are shown to be at least two plants in the state of South Carolina producing electric current by the use of internal combustion engines, but these plants are shown to be small and the business done by them to be comparatively insignificant.

10. That there are a number of industrial plants in the state of South Carolina manufacturing and generating power for the use of themselves and their employees, and there are a number of municipalities in the State of South Carolina generating electricity for the use of their customers.

11. That electricity is brought into South Carolina from other states and sold and the current so sold is subjected to the sales tax imposed by subsection (c) of section 1 of the act, whereas electric current generated within the state upon which the generation tax has been paid is not subject to such sales tax.

12. That complainant's plant was built upon the Saluda River, one of the navigable streams within the state of South Carolina, under license issued to it by the Federal Water Power Commission, a copy of which license is attached to the bill of complaint and marked exhibit B. Saluda dam of Lexington Water Power Company as now constructed prevents the passage of any water craft from a point below the dam to a point above the dam and vice versa.

Conclusions of Law

Upon the foregoing findings of fact, the Court concludes as a matter of law:

1. That the statute does not deny to complainant due process of law or the equal protection of the laws in violation of the Constitution of the United States because gas [fol. 107] companies are not taxed nor because the tax is not imposed upon the production of electricity by the use of oil or internal combustion engines.

2. That the statute does not deny to complainant due process of law or the equal protection of the laws because it exempts from the tax industrial plants generating power for their own use or the use of their employees, and municipalities generating power for the use of their customers.

3. That the statute does not deny to complainant the equal protection of the laws because it exempts from the sales tax electric current upon which the generation tax has already been paid.

4. That the statute does not deprive complainant of property without due process of law because of the provision that the revenue produced for the year 1931 shall reduce the 1931 property levy for state purposes to the full amount raised under the statute.

5. That the statute does not violate section 4 of article 10 of the Constitution of South Carolina in that it exempts municipalities from the terms of the act.

6. That the statute does not violate section 3 of article 10 of the Constitution of South Carolina in providing that the revenue produced under the act for the year 1931 shall reduce the 1931 property levy by the full amount raised under the terms of the Act.

7. That the statute does not burden interstate commerce as to the electricity generated by complainant because the tax is placed upon the generation and not upon the transmission in interstate commerce and also because the current transmitted in interstate commerce is the high voltage current induced in the transformer and not the low voltage current upon which the generation tax is imposed.

[fol. 108] 8. That the tax imposed upon complainant does not constitute a burden upon an agency of the federal government.

9. That the statute, by imposing the tax in question, does not violate the Commerce Clause of the Constitution, nor article 1, section 8, of the Constitution of South Carolina.

10. That the Statute in question is valid and violates no provision of the Constitution of the United States or of the Constitution of South Carolina.

11. That the bill of complaint herein should be dismissed for want of equity.

This the 21st day of July, 1932.

(Signed) John J. Parker, U. S. Circuit Judge, Fourth Circuit. (Signed) Elliott Northcott, U. S. Circuit Judge, Fourth Circuit. (Signed) Ernest F. Cochran, U. S. District Judge.

[fol. 109] In United States District Court for the Eastern District of South Carolina

Lexington Water Power Company, Complainant,

v.

Walter G. Query, J. P. Derham, and Frank C. Robinson, as Members of and Constituting the South Carolina Tax Commission, Defendants

Final Decree Dismissing Bill—Filed July 21, 1932

This cause coming on to be heard before the undersigned, constituting a court of three judges convened pursuant to Section 266 of the Judicial Code, and being heard upon the bill, answer, affidavits, stipulation of the parties as to the facts and arguments of counsel; and the court having made and filed its findings of fact and conclusions of law as required by the Equity Rule of the Supreme Court; thereupon, upon consideration thereof

It is ordered, adjudged, and decreed that the bill of complaint herein be, and the same hereby is, dismissed for want

of equity, with costs to the defendants. This 21st day of July, 1932.

(Signed) John J. Parker, U. S. Circuit Judge, Fourth Circuit. (Signed) Elliott Northcott, U. S. Circuit Judge, Fourth Circuit. (Signed) Ernest F. Cochran, U. S. District Judge.

[fol. 110] IN UNITED STATES DISTRICT COURT

RESTRAINING ORDER PENDING APPEAL—Filed July 21, 1932.

Whereas, in the above entitled cause a bill of complaint for a perpetual injunction has been filed and the cause has heretofore been heard by a court of three judges, composed of the undersigned, convened pursuant to the provisions of Section 266 of the Judicial Code and a final decree has been entered denying such application for an injunction and dismissing said bill of complaint; and

Whereas, the said Complainant has obtained an order allowing an appeal from said decree, and it appearing from the papers on file in this cause that there is danger of immediate and irreparable loss or damage to the Complainant unless the Defendants are, pending a hearing and determination of said appeal, restrained as herein set forth;

Now, therefore, it is ordered that the defendants, and each of them, their successors in office and their servants, agents, attorneys and counsellors be, and they hereby are, pending the hearing and determination of the appeal from the final decree herein and until the further order of this Court, enjoined and restrained from enforcing, or taking any steps to enforce, directly or indirectly, against the Complainant above named, the terms and provisions of an Act of the General Assembly of South Carolina, approved May 9, 1931, entitled "An act to raise revenue for the sup-
[fol. 111] port of the State Government by the imposition of an excise tax upon electric power generated and sold within this State".

Further ordered that the Complainant herein give a bond in the sum of $10,000.00 conditioned to pay such damages as the Defendants may suffer if said Complainant shall fail to prosecute its appeal to effect and if it fails to make its

plea good, which bond shall be with surety or sureties approved by the United States District Judge for the Eastern District of South Carolina and shall be filed within ten days from the date hereof.

(Signed) John J. Parker, U. S. Circuit Judge, Fourth Circuit. (Signed) Elliott Northcott, U. S. Circuit Judge, Fourth Circuit. (Signed) Ernest F. Cochran, United States District Judge.

Dated July 21st, 1932.

I consent to the issuance of the foregoing order upon the execution of bond in the amount therein set forth, and consent that the order may be signed by the members of the statutory court separately and without assembling.

(Signed) J. Fraser Lyon, Solicitor for Defendants.

[fols. 112 & 113] Bond on restraining order for $10,000, approved and filed August 3, 1932, omitted in printing.

[fol. 114] In United States District Court

Petition for Appeal, Assignment of Errors, and Prayer for Reversal—Filed July 21, 1932

Considering itself aggrieved by the decision and final decree of the Court of three judges convened in the above entitled case pursuant to Section 266 of the Judicial Code, the Complainant therein, Lexington Water Power Company, hereby prays that an appeal be allowed to the Supreme Court of the United States herein, and for an order fixing the amount of the bond thereon.

Assignment of Errors

And the said Complainant assigns the following errors in the records and proceedings in said case:

1. The Court erred in holding that the South Carolina Statute of May 9, 1931 entitled "An act to raise revenue for the support of the State Government by the imposition of

an excise tax upon electric power generated and sold within this State" does not deny to complainant due process of law or the equal protection of the laws in violation of the Constitution of the United States because gas companies are not taxed nor because the tax is not imposed upon the production of electricity by the use of oil or internal combustion engines.

2. The Court erred in holding that the South Carolina Statute of May 9, 1931, entitled "An act to raise revenue [fol. 115] for the support of the State Government by the imposition of an excise tax upon electric power generated and sold within this State" does not deny to complainant due process of law or the equal protection of the laws because it exempts from the tax industrial plants generating power for their own use or the use of their employees, and municipalities generating power for the use of their customers.

3. The Court erred in holding that the South Carolina Statute of May 9, 1931 entitled "An act to raise revenue for the support of the State Government by the imposition of an excise tax upon electric power generated and sold within this State" does not deny to complainant the equal protection of the laws because it exempts from the sales tax electric current upon which the generation tax has already been paid.

4. The Court erred in holding that the tax imposed upon complainant by the Statute in question does not constitute a burden upon an agency of the Federal Government.

5. The Court erred in holding that the South Carolina Statute of May 9, 1931 entitled "An act to raise revenue for the support of the State Government by the imposition of an excise tax upon electric power generated and sold within this State" does not violate article 1, section 8, of the Constitution of South Carolina.

6. The Court erred in holding that the South Carolina Statute of May 9, 1931 entitled "An Act to raise revenue for the support of the State Government by the imposition of an excise tax upon electric power generated and sold within this State" is valid and violates no provision of the

Constitution of the United States or of the Constitution of South Carolina.

7. The Court erred in holding that the complainant is not [fol. 116] entitled to the injunction prayed.

8. The Statute of the State of South Carolina enacted May 9, 1931 entitled "An Act to raise revenue for the support of the State Government by the imposition of an excise tax upon electric power generated and sold within this State" is in contravention of the Constitution of the United States, especially the due process of law and equal protection of the laws clauses of the Fourteenth Amendment to said Constitution, and as applied to Complainant constitutes a tax on an agency of the Federal Government.

Prayer for Reversal.

For which errors the Complainant, Lexington Water Power Company prays that the said decree of the District Court of the United States for the Eastern District of South Carolina dated July 21st, 1932, in the above entitled cause be reversed and a decree rendered in favor of the said Complainant, and for costs.

Geo. M. LePine, W. C. McLain, Solicitors for Complainant. Elliot, McLain, Wardlaw & Elliot, Columbia, South Carolina; Travis, Paxson, Wallace & Philbin, 61 Broadway, New York, N. Y., Counsel.

In United States District Court

Order Allowing Appeal—Filed July 21, 1932

And now, to wit, on 21st, July, 1932, it is ordered that the appeal be allowed as prayed for upon the filing of bond in the sum of $250.00, as required by Rule of the District Court.

Ernest F. Cochran, U. S. District Judge.

Bond for Costs on Appeal, $250.00 cash deposited.

[fol. 117] IN UNITED STATES DISTRICT COURT

ORDER ENLARGING TIME TO FILE TRANSCRIPT OF RECORD—Filed August 24, 1932

For good cause shown, it is ordered that the time for filing the transcript of record on appeal in the above entitled cause with the Clerk of the Supreme Court of the United States, be enlarged from the 25th day of August, 1932, to the 24th day of September, 1932.

Ernest F. Cochran, U. S. District *Court.*

August 24th, 1932.

[fol. 118] IN UNITED STATES DISTRICT COURT

STIPULATION AS TO CONTENTS OF TRANSCRIPT—Filed September 15, 1932

It is hereby stipulated and agreed by and between the Solicitors for the respective parties that the transcript of record to be filed in the Supreme Court of the United States, pursuant to the appeal heretofore allowed herein, shall include the following:

Bill of Complaint.
Exhibit "A", Revenue Act.
Exhibit "B", License.
Application for temporary restraining order and interlocutory Injunction.
Rule to show cause.
Answer.
Affidavit of W. E. Rowe.
Affidavit of Robert A. Millikan.
Opinion.
Findings of Fact and Conclusions of Law.
Decree Denying Interlocutory Injunction.
Stipulation and Agreement of Counsel.
Order calling together three Judge Court for June 13, 1932.
Opinion.
Findings of Fact and Conclusions of Law.
Final Decree Dismissing Bill.
Restraining Order pending appeal.

Bond for Restraining Order pending appeal.
Petition for Appeal.
Assignment of Errors.
Prayer for Reversal.
Order Allowing Appeal.
Bond for Costs on Appeal $250.00 cash deposited.
[fol. 119] Order Extending Time to file Transcript of Record dated August 24, 1932.
Stipulation as to contents of transcript of record.
Citation.
Service of Citation.
Clerk's Certificate.

Geo. M. LePine, W. C. McLain, Attorneys for Complainant. J. Fraser Lyon, Attorney for Defendants.

Dated this 14 day of September, 1932.

[fol. 120] Citation, in usual form, showing service on J. Fraser Lyon, filed July 26, 1932, omitted in printing.

[fol. 121] Clerk's certificate to foregoing transcript omitted in printing.

[fols. 122 & 123] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed Oct. 6, 1932

Comes now the Appellant and adopts its assignments of error as its statement of the points to be relied upon and represents that the whole of the record, as filed, is necessary for the consideration of the case.

Geo. M. LePine, Counsel for Appellant.

Due service of the foregoing is hereby admitted.

J. Fraser Lyon, Counsel for Appellees.

[fol. 124] [File endorsement omitted.]

Endorsed on cover: File No. 37,088. E. South Carolina D. C. U. S. Term No. 391. Lexington Water Power Company, appellant, vs. Walter G. Query, J. P. Derham, and Frank C. Robinson, as members of and constituting the South Carolina Tax Commission. Filed September 22, 1932. File No. 37,088.

FILE COPY

FILED
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CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 390

LEXINGTON WATER POWER COMPANY
Complainant-Appellant

v.

WALTER G. QUERY, J. P. DERHAM and FRANK C. ROBINSON, as members of and constituting the South Carolina Tax Commission
Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

STATEMENT AS TO JURISDICTION ON APPEAL

W. C. McLAIN
GEORGE M. LEPINE
Solicitors for Appellant

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Of Counsel

APPEAL PRINTING CO., 32 THAMES ST., NEW YORK CITY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932.

No. 390.

LEXINGTON WATER POWER COMPANY,
Complainant-Appellant,

v.

WALTER G. QUERY, J. P. DERHAM and FRANK C. ROBINSON, as members of and constituting the South Carolina Tax Commission,
Defendants-Appellees.

STATEMENT AS TO JURISDICTION ON APPEAL.

In compliance with Rule 12 of this Court the appellant states:

A.

Statutory Provision Sustaining Jurisdiction.

The statutory provision sustaining the jurisdiction of this Court to review the decree of the court below is Section 266 of the Judicial Code (United States Code Annotated, Title 28, Section 380) which provides that an appeal may be taken direct to the Supreme Court of the United States from a decree granting or denying a permanent injunction in a case of the character therein described. The decree sought to be reviewed by this appeal is a decree denying a permanent injunction in a suit instituted against the Tax Com-

mission of the State of South Carolina seeking to restrain the enforcement of a statute levying a tax on electricity, on the ground that said statute was unconstitutional, heard before the statutory court of three judges which denied a temporary injunction, which is a suit of the character described in the above-mentioned statute.

B.

Date of Decree and Date of Application for Appeal.

The decree sought to be reviewed was entered on the 21st day of July, 1932 (R. 104).*

The application for appeal was presented on the 23rd day of July, 1932 (R. 109).

C.

Nature of Case and Ruling Below.

This suit was instituted by a bill of complaint filed on June 6, 1931 (R. 2), in which the complainant prayed for a temporary and permanent injunction restraining the defendants, the Tax Commission of the State of South Carolina, from collecting the taxes attempted to be imposed by an Act of the Legislature of South Carolina which became a law on May 9, 1931 (R. 19), which purports to levy a tax of one-half mill per kilowatt hour on electricity generated by water power or steam within the State of South Carolina or sold within the State of South Carolina.

The Tax Act above referred to was alleged to be unconstitutional because:

1. The classification of subjects of taxation amounted to a denial of equal protection of the laws

* All references to the record are to pages of the certified unprinted record prepared by the Clerk of the District Court and on file with the Clerk of this Court. The record has not yet been printed.

in violation of the Fourteenth Amendment to the Federal Constitution as well as the similar provision in the Constitution of South Carolina.

2. The statute as applied to the complainant was unconstitutional as an attempt to levy a tax on an agency of the United States Government, inasmuch as the tax was a license or privilege tax on complainant's operation of a water power plant constructed and operated under a permit from the Federal Power Commission issued under the Federal Water Power Act.

3. The statute as applied to the complainant was an unlawful interference with interstate commerce in violation of Section 8 of Article I of the Constitution of the United States, as the electricity generated at the complainant's plant was generated for use in the State of North Carolina.

Thereafter, pursuant to Section 266 of the Judicial Code, the District Judge of the United States District Court for the Eastern District of South Carolina called together three judges to hear and determine the application for an interlocutory injunction, the application being heard on July 9, 1931.

On September 7, 1931, the Court of three judges, in an opinion by Honorable JOHN J. PARKER, Circuit Judge, denied the interlocutory injunction prayed for (R. 65). Honorable ELLIOTT NORTHCOTT, Circuit Judge, and Honorable ERNEST F. COCHRAN, District Judge, concurred. The Court made findings of fact and conclusions of law (R. 85) overruling the contentions of complainant, and entered an order or decree denying the interlocutory injunction prayed for (R. 89). An appeal was thereupon taken to this Court, upon which

appeal the order denying the interlocutory injunction was affirmed, without considering the merits of the case (286 U. S. 525), on the authority of *Alabama* v. *United States*, 279 U. S. 229, and similar cases.

The case subsequently came on for final hearing and a final decree was entered dismissing the bill (R. 104).

On July 23, 1932, complainant filed a petition for appeal, assignment of errors and prayer for reversal (R. 109). Said petition for appeal was allowed on July 23, 1932 (R. 111).

The citation on appeal was issued July 25, 1932 (R. 115).

The time for filing the transcript of record was subsequently extended for thirty (30) days (R. 112).

The transcript of record was filed and the case docketed in this Court on September 22, 1932.

D.

Cases Supporting Jurisdiction of Court.

The jurisdiction of this Court is sustained by the statutory provision granting a direct appeal to this Court from the decree of the District Court in cases of this character (Section 266 of Judicial Code; Title 28, Section 380 United States Code Annotated). It is also sustained by the following cases which support the jurisdiction of this Court in cases of this character:

Interstate Buses Corporation v. *Blodgett*, 276 U. S. 245;

Herkness v. *Irion*, 278 U. S. 92.

All of which is respectfully submitted.

W. C. McLain,
George M. LePine,
Solicitors for Appellant.

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FILED
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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 391

BROAD RIVER POWER COMPANY
Complainant-Appellant

v.

WALTER G. QUERY, J. P. DERHAM and FRANK C. ROBINSON, as members of and constituting the South Carolina Tax Commission
Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

STATEMENT AS TO JURISDICTION ON APPEAL

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932.

No. 391.

BROAD RIVER POWER COMPANY,
Complainant-Appellant,

v.

WALTER G. QUERY, J. P. DERHAM and FRANK C. ROBINSON, as members of and constituting the South Carolina Tax Commission,
Defendants-Appellees.

STATEMENT AS TO JURISDICTION ON APPEAL.

In compliance with Rule 12 of this Court the appellant states:

A.

Statutory Provision Sustaining Jurisdiction.

The statutory provision sustaining the jurisdiction of this Court to review the decree of the court below is Section 266 of the Judicial Code (United States Code Annotated, Title 28, Section 380) which provides that an appeal may be taken direct to the Supreme Court of the United States from a decree granting or denying a permanent injunction in a case of the character therein described. The decree sought to be reviewed by this appeal is a decree denying a permanent injunction in a suit instituted against the Tax

Commission of the State of South Carolina seeking to restrain the enforcement of a statute levying a tax on electricity, on the ground that said statute was unconstitutional, heard before the statutory court of three judges which denied a temporary injunction, which is a suit of the character described in the above-mentioned statute.

B.

Date of Decree and Date of Application for Appeal.

The decree sought to be reviewed was entered on the 21st day of July, 1932 (R. 79).*

The application for appeal was presented on the 23rd day of July, 1932 (R. 84).

C.

Nature of Case and Ruling Below.

This suit was instituted by a bill of complaint filed on June 6, 1931 (R. 2), in which the complainant prayed for a temporary and permanent injunction restraining the defendants, the Tax Commission of the State of South Carolina, from collecting the taxes attempted to be imposed by an Act of the Legislature of South Carolina which became a law on May 9, 1931 (R. 14), which purports to levy a tax of one-half mill per kilowatt hour on electricity generated by water power or steam within the State of South Carolina or sold within the State of South Carolina.

The Tax Act above referred to was alleged to be unconstitutional because the classification of subjects of taxation

* All references to the record are to pages of the certified unprinted record prepared by the Clerk of the District Court and on file with the Clerk of this Court. The record has not yet been printed.

amounted to a denial of equal protection of the laws in violation of the Fourteenth Amendment to the Federal Constitution as well as the similar provision in the Constitution of South Carolina.

Thereafter, pursuant to Section 266 of the Judicial Code, the District Judge of the United States District Court for the Eastern District of South Carolina called together three judges to hear and determine the application for an interlocutory injunction, the application being heard on July 9, 1931.

On September 7, 1931, the Court of three judges, in an opinion by Honorable JOHN J. PARKER, Circuit Judge, denied the interlocutory injunction prayed for (R. 36). Honorable ELLIOTT NORTHCOTT, Circuit Judge, and Honorable ERNEST F. COCHRAN, District Judge, concurred. The Court made findings of fact and conclusions of law (R. 61) overruling the contentions of complainant, and entered an order or decree denying the interlocutory injunction prayed for (R. 65). An appeal was thereupon taken to this Court, upon which appeal the order denying the interlocutory injunction was affirmed, without considering the merits of the case (286 U. S. 525), on the authority of *Alabama* v. *United States*, 279 U. S. 229, and similar cases.

The case subsequently came on for final hearing and a final decree was entered dismissing the bill (R. 79).

On July 23, 1932, complainant filed a petition for appeal, assignment of errors and prayer for reversal (R. 84). The petition for appeal was allowed on July 23, 1932 (R. 86).

The citation on appeal was issued July 25, 1932 (R. 89).

The time for filing the transcript of record was subsequently extended for thirty (30) days (R. 87).

The transcript of record was filed and the case docketed in this Court on September 22, 1932.

D.

Cases Supporting Jurisdiction of Court.

The jurisdiction of this Court is sustained by the statutory provision granting a direct appeal to this Court from the order of the District Court in cases of this character (Section 266 of Judicial Code; Title 28, Section 380 United States Code Annotated). It is also sustained by the following cases which support the jurisdiction of this Court in cases of this character:

Interstate Buses Corporation v. *Blodgett*, 276 U. S. 245;

Herkness v. *Irion*, 278 U. S. 92.

All of which is respectfully submitted.

W. C. McLAIN,
GEORGE M. LEPINE,
Solicitors for Appellant.

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JAN 19 1933

CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

October Term, 1932

No. 390

BROAD RIVER POWER COMPANY
Appellant

v.

WALTER G. QUERY, J. P. DERHAM and FRANK C. ROBINSON, as Members of and Constituting the South Carolina Tax Commission
Appellees

No. 391

LEXINGTON WATER POWER COMPANY
Appellant

v.

WALTER G. QUERY, J. P. DERHAM and FRANK C. ROBINSON, as Members of and Constituting the South Carolina Tax Commission
Appellees

ON APPEAL FROM FINAL DECREES OF STATUTORY COURT (U. S. DISTRICT COURT, EASTERN DISTRICT, S. C.) DENYING INJUNCTION

BRIEF OF APPELLANTS

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Supreme Court of the United States

October Term, 1932

No. 390

BROAD RIVER POWER COMPANY,

Appellant,

v.

WALTER G. QUERY, J. P. DERHAM and FRANK C. ROBINSON, as Members of and Constituting the South Carolina Tax Commission,

Appellees.

No. 391

LEXINGTON WATER POWER COMPANY,

Appellant,

v.

WALTER G. QUERY, J. P. DERHAM and FRANK C. ROBINSON, as Members of and Constituting the South Carolina Tax Commission,

Appellees.

ON APPEAL FROM FINAL DECREES OF STATUTORY COURT (U. S. DISTRICT COURT, EASTERN DISTRICT, S. C.) DENYING INJUNCTION.

BRIEF OF APPELLANTS

I

Opinion of Court Below

The opinion below (*South Carolina Power Co.* v. *South Carolina Tax Commission*) is reported in 60 F. (2d) 528. This opinion was rendered in three cases against the South Carolina Tax Commission, which included the two cases above entitled. The court below denied an injunction restraining the enforcement of a statute levying a tax on electricity, which was the relief prayed for. The same court had previously denied an interlocutory injunction. Its opinion thereon is reported in 52 F. (2d) 515. The decision of the court below on the denial of an interlocutory injunction was affirmed (286 U. S. 525) without considering the merits, on the authority of *Alabama* v. *United States*, 279 U. S. 229, and similar cases.

The Question Involved

The question involved in these cases is the constitutionality of a statute of the State of South Carolina (printed as an appendix hereto) which purports to levy a tax of one-half mill per kilowatt hour on electricity generated or sold within the State of South Carolina.

II

Statement of the Case

These suits were instituted in the United States District Court for the Eastern District of South Carolina against the South Carolina Tax Commission, the relief prayed

being an injunction against the enforcement of a statute of the State of South Carolina, printed as an appendix hereto, enacted at the session of the State Legislature in 1931, imposing a tax of one-half mill per kilowatt hour, as "an excise, license or privilege tax" upon the following persons:

(a) Every person, firm or corporation engaged in the business of manufacturing or generating hydro-electric power in the State of South Carolina;

(b) Every person, firm or corporation engaged in the business of manufacturing or generating electric power by the use of steam power in the State of South Carolina;

(c) Every person, firm or corporation engaged in the business of selling electric power within the State of South Carolina.

The statute exempts from the tax the following persons (Section 1, Subdivision c):

1. Sellers of electricity which has been subject to the payment of a generation tax, who are allowed a credit for the amount of tax paid by the person, firm or corporation generating the same.

2. Electric power manufactured or generated in another State and brought into South Carolina until such power has lost its interstate character and immunities.

3. Any person, firm or corporation owning and operating a generating plant of ten horse-power or less.

4. Industrial plants manufacturing or generating power for their own use, or for use upon their own premises by their *bona fide* operatives or employees, "but the

tax shall be paid upon so much thereof as may be sold to other than its employees."

5. Municipalities manufacturing or generating electricity for the use of their customers.

The Act further provides (Section 3) for a monthly return by the persons subjected to the tax and requires the tax to be paid monthly. Failure to make a monthly return subjects the offender to a 25% penalty, and failure to pay the tax subjects the offender to an additional penalty of 25%. Persons liable to the tax are permitted to pay the same under protest (Section 4), but the right to recover taxes so paid is subject to a statute of limitations requiring suit to be brought within thirty days after payment, and in case of recovery the taxpayer is permitted to recover the amount of the tax with interest at 4%.

The appellant Lexington Water Power Company is a company engaged in the generation of electricity at a plant constructed under a license from the Federal Power Commission, all of which electricity is sold at wholesale to distributing companies. The appellant Broad River Power Company generates and distributes electricity to ultimate consumers.

The bills of complaint* (R. 1) alleged that the statute above referred to was violative of various provisions of the State and Federal Constitutions. A preliminary injunction was applied for (R. 34) and thereafter the District Judge called to his assistance two circuit judges to hear the applications for a preliminary injunction.

The statutory court made findings of fact and conclusions of law (R. 68) in which it found that the statute

* While there are separate transcripts on each of these two appeals, the records are practically identical and for convenience all references are made to the transcript in No. 391, except as otherwise noted.

was subject to no constitutional objections, and accordingly a decree denying an interlocutory injunction was entered (R. 71). The statutory court rendered its opinion through PARKER, Circuit Judge (R. 45). That decree was affirmed by this court, without considering the merits (286 U. S. 525). The case then proceeded to final hearing in the statutory court, which entered its final decree denying an injunction (R. 75), making new findings of fact and conclusions of law (R. 79). Thereupon, this appeal was instituted. (For petition to appeal, assignment of errors and prayer for reversal, see R. 85; order allowing appeal, R. 87.)

The grounds upon which it is claimed the statute in question is unconstitutional, so far as they are now insisted upon, are as follows:

1. That the taxing statute denies to the appellants the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States, because the tax is imposed upon the production of electricity by water power or steam power, while the production of electricity by the use of oil or internal combustion engines is not taxed. It appears that there are in the State of South Carolina plants at which electric energy is generated by oil or combustion engines. (See Finding of Fact No. 9; R. 81.) It is the contention of the appellants that failure to tax electricity of this character renders the statute unconstitutional.

2. That the statute denies to the appellants the equal protection of the laws because it exempts from the tax industrial plants generating power for their own use or for the use of their employees.

3. As to Lexington Water Power Company only, that the statute is violative of the Federal Constitution in that the tax imposed upon the appellant in this case is a tax upon an agency of the Federal Government. All of the electricity generated by the Lexington Water Power Company is generated at a water power plant owned by it and located on the Saluda River in the State of South Carolina. This plant was constructed and is operated pursuant to a license duly granted by the Federal Power Commission pursuant to the provisions of the Federal Water Power Act (R. 4). The license of the appellant was printed as an Exhibit to the bill of complaint (R. 18), and it is contended that to impose an excise, license or privilege tax on this operation is to tax a Federal Agency and so violative of the Federal Constitution.

The equitable jurisdiction of the court was invoked on the ground that there was no adequate remedy at law for two reasons:

(a) The remedy at law would result in a multiplicity of suits, due to the fact that under the express terms of the statute a suit to recover a tax paid under protest must be instituted within thirty days after each monthly payment, or be barred by the statute of limitations;

(b) The remedy at law was not complete for the reason that the statute permitted the recovery of only 4% interest on taxes paid under protest.

While the case was determined below on affidavits, there is no dispute as to the facts.

III

Specification of Errors

The statutory court erred in holding:

1. That the taxing statute in question did not deny to the appellants the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States, in exempting from taxation the production of electricity by the use of oil or internal combustion engines (R. 82).

2. That the taxing statute in question did not deny to the appellants the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States, in exempting from the tax industrial plants generating power for their own use or for the use of their employees (R. 82).

3. That the taxing statute in question was not violative of the Constitution of the United States as constituting a tax upon an agency of the Federal Government (R. 83).

IV

Summary of Points Discussed

1. The taxing statute in question violates the Fourteenth Amendment to the Constitution of the United States in exempting from taxation the production of electricity by the use of oil or internal combustion engines (p. 8, *infra*).

2. The taxing statute in question violates the Fourteenth Amendment to the Constitution of the United States in exempting from taxation industrial plants generating power for their own use or for the use of their employees (p. 14, *infra*).

3. The taxing statute in question as applied to appellant Lexington Water Power Company imposes a tax upon an agency of the Federal Government in violation of the Constitution of the United States (p. 17, *infra*).

4. The remedy at law being inadequate, a court of equity should restrain the enforcement of the taxing statute in question (p. 21, *infra*).

V

ARGUMENT

POINT ONE

The Taxing Statute in question violates the Fourteenth Amendment to the Constitution of the United States in exempting from taxation the production of electricity by the use of oil or internal combustion engines.

It appears that there are in the State of South Carolina plants at which electric energy is generated by oil or combustion engines, and that the electric energy so generated is of exactly the same character as electricity generated by hydro-electric or steam generating plants (R. 6, and see Finding of Fact No. 9, R. 81). Nevertheless, the statute in question taxes only the generation of hydro and steam

generated electricity. The statutory court took the position that the production of electric current by the use of oil or internal combustion engines was a business so fundamentally different from the production of electric current at hydro or steam plants that the Legislature was justified in its classification. The lower court said:

> "The record shows that only two very small plants in the state of South Carolina are engaged in producing electricity in this manner; and, if the legislature knew of their existence at all, it may well have determined that the volume of their business was so small and their relative cost of production so great as to put them in a class entirely different from the great power companies producing current from water power and coal" (R. 50).

The general principles which control the states in classification for taxing purposes are well settled.

In *Ohio Oil Co.* v. *Conway,* 281 U. S. 146, the court said:

> "The applicable principles are familiar. The States have a wide discretion in the imposition of taxes. When dealing with their proper domestic concerns, and not trenching upon the prerogatives of the national government or violating the guarantees of the Federal Constitution, the States have the attribute of sovereign powers in devising their fiscal systems to insure revenue and foster their local interests. The States, in the exercise of their taxing power, as with respect to the exertion of other powers, are subject to the requirements of the due process and the equal protection clauses of the Fourteenth Amendment, but that Amendment imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to schemes of taxation. The State may tax real and personal property in a different manner. It may grant

exemptions. The State is not limited to *ad valorem* taxation. It may impose different specific taxes upon different trades and professions and may vary the rates of excise upon various products. In levying such taxes, the State is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value. To hold otherwise would be to subject the essential taxing power of the State to an intolerable supervision, hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to assure.

"With all this freedom of action, there is a point beyond which the State cannot go without violating the equal protection clause. The State may classify broadly the subjects of taxation, but in doing so it must proceed upon a rational basis. The State is not at liberty to resort to a classification that is palpably arbitrary. The rule is generally stated to be that the classification 'must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' *Royster Guano Company* v. *Virginia*, 253 U. S. 412, 415; *Louisville Gas Company* v. *Coleman*, 277 U. S. 32, 37; *Air-Way Corporation* v. *Day*, 266 U. S. 71, 85; *Schlesinger* v. *Wisconsin*, 270 U. S. 230, 240."

The same principles are stated in the opinion of this court in *State Board of Tax Commissioners of Indiana* v. *Jackson*, 283 U. S. 527.

The question, therefore, is whether the classification is "palpably arbitrary" and whether the classification rests "upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." within the State, because of its discriminatory feature is not used by them on their premises for lighting purposes,

Applying these tests to the case at bar the question may be said to be whether the business of generating electricity by oil or internal combustion engines is a different business than that of generating electricity at a water power or steam plant. The purpose of this generation is to provide electricity for distribution to retail consumers. The electricity so generated has the same characteristics as electricity generated in any other manner. The electricity is useful and used for the same purposes. To exempt such electricity from the generation tax results in precisely the discrimination which the Fourteenth Amendment prohibits. It places one manufacturer of electricity on a better plane than another. It fosters one class because, as stated by the court below, "their relative cost of production (is) so great" (R. 50). It penalizes generators of electricity who by a greater investment produce electricity more economically. If the statute had classified generators of electricity according to their cost of production there would be no question that the statute was unconstitutional. To permit the Legislature to classify according to the method of generation and justify the classification because of the greater cost of one method is subject to absolutely the same objection.

In the absence of a better "ground of difference" it must be said that the statute does not treat all persons similarly circumstanced alike.

The classification in the statute in question must be held to be "a mere arbitrary selection."

This court has held taxing statutes to be objectionable which were no more arbitrary in their classification than is the statute here in question.

In *Royster Guano Company* v. *Virginia*, 253 U. S. 412, this court set aside a statute taxing the entire income, earned within and without the State, of domestic corporations, which exempted domestic corporations doing no business within the State, because of its discriminatory feature in not exempting the foreign income of all domestic corporations.

In *Southern Railway Co.* v. *Greene*, 216 U. S. 400, this court set aside a franchise tax imposed upon foreign railroad corporations operating within the State of Alabama, based upon the amount of capital stock employed within the State, where the tax on domestic corporations was at a lower rate.

The state courts have held unconstitutional statutes which are more nearly like the one here involved. Thus, in *Salt Lake City* v. *Utah L. & Rwy. Co.*, 45 Utah 50, the imposition of a license tax of a certain sum per meter upon electric companies furnishing electricity through meters, and no tax on electric companies not using meters, was held unreasonable in its classification.

In *Standard Oil Co.* v. *Fredericksburg*, 105 Va. 82, an ordinance imposing one rate of taxation on oil dealers selling oil brought into the city in tank cars or pipes, and a different rate on dealers in oils brought into the city in other ways was held discriminatory.

Likewise, in *Pullman P. C. Co.* v. *State*, 64 Tex. 274, a statute taxing the occupation of operating sleeping cars on railroads, which exempted railroads operating their own sleeping cars, was held arbitrary in its classification.

Under these authorities it cannot be questioned that the classification of electric companies according to their method of generation, as is attempted by the statute in question, is violative of the Fourteenth Amendment.

The lower court suggested that because the sale of electricity produced by internal combustion engines was taxed, this might be given some effect (R. 50). This, however, does not in any way affect the objection to the statute for the reason that even if the tax were so applied, the taxation would be at a different rate. The taxing statute in question, so far as it taxes the sale of electricity (Section 1 [c], R. 14), taxes only the electricity sold, which means the amount of electricity recorded by the consumers' meters, and does not tax electricity used by the generating company, or what is commonly known as line losses. The result is that generators of electricity by oil or combustion engines pay a tax of a much smaller amount than generators of electricity by water or steam power producing the same amount of electricity. If the classification is unreasonable, the fact that some tax is imposed on persons generating by oil or combustion engines does not save the statute.

If this statute can be sustained, then it must be said that the State can tax electricity generated by the use of anthracite coal as a fuel at one rate, generators by the use of bituminous coal at another rate, and generators of electricity in steam plants using fuel oil at an entirely different rate. Such legislation has absolutely no basis for justification.

POINT TWO

The Taxing Statute in question violates the Fourteenth Amendment to the Constitution of the United States in exempting from taxation industrial plants generating power for their own use or for the use of their employees.

Section 1 (c) of the Taxing Statute in question (R. 15) contains the following proviso:

> "Nor shall the provisions of this act apply to industrial plants manufacturing or generating power for its own use, or for use upon its own premises by its *bona fide* operatives or employees but the tax shall be paid upon so much thereof as may be sold to other than its employees."

There are in the State of South Carolina a large number of manufacturing companies having textile plants and also engaged in the generation of electricity, some of which is consumed in manufacturing, some furnished to employees, and a large amount sold to the general public. Under the statute the only tax paid by such companies is on the electricity consumed by the general public as shown by the consumers' meters. These companies are engaged in the public utility business so far as their outside activities are concerned. Under the statute in question these companies are taxed on their electric operations at a much lower rate than the appellants in this case. It appears that the appellants generate a large amount of electric energy which is used by them on their own premises for lighting purposes, power purposes and for the use of their employees who reside on premises owned by the appellants. The appellants

also consume a large amount of the electricity generated by them for the purpose of maintaining voltages on transmission lines (commonly known as line losses) (R. 7). Under the taxing statute in question the appellants are required to pay a tax on all electricity generated by them, including the electricity used for their own purposes and the purposes of their employees. The result of the statute is that one class of generators of electricity, including the appellants, is taxed on all electricity generated, if they do not own a textile mill, while another generator of electricity, if it owns a textile mill, is taxed solely on the electricity shown on the meters of its consumers, other than employees, to have been consumed by them. There is absolutely no difference in the type of business conducted by the two classes, so far as its activities as a public utility are concerned, and yet the Legislature classifies them differently for the purpose of taxation.

The lower court attempted to sustain this classification under the decision of this court in *American Sugar Refining Co.* v. *Louisiana,* 179 U. S. 89. That case involved a license tax on persons engaged in the business of refining sugar and molasses, but provided that the statute should not apply to planters and farmers grinding and refining their own sugar and molasses. The court said that:

> "The act is not one exempting planters who use their sugar in the manufacture of articles of a wholly different description, such as confectionery, preserves or pastry, or such as one which should exempt the farmer who devoted his corn or rye to the making of whiskey, while other manufacturers of these articles were subjected to a tax. A somewhat different question might arise in such case, since none of these articles are the natural products of the farm—such products only becoming useful by being commingled with other ingredients. Refined sugar, however, is

> the natural and ultimate product of the cane, and the various steps taken to perfect such product are but incident to the original growth."

This, however, supports rather than detracts from the position taken by the appellants in this case. Here, the Legislature is not fostering the production of a local commodity by the producers, but is fostering the electric business of textile companies at the expense of others engaged in the electric business who are not engaged in textile manufacturing. There would be no objection in this connection to a sales tax which exempted electricity consumed by the producer in his own manufacturing business, if other generators of electricity were taxed solely on the electricity sold to the general public. This, however, is not the case. One result of this discrimination is that textile companies engaged in the electric business are put in a more favorable position to compete for business at wholesale or retail at distant points due to the fact that they are required to pay a tax only on the amount of electricity sold at the point of consumption, while other electric companies must pay a tax on all electricity generated, including electricity consumed at the plant and in keeping up voltages on transmission lines to the ultimate point of consumption. Another result is that textile mills which purchase their electricity are indirectly taxed thereon, which can have but one effect on electric companies generally, to wit, a loss of all textile consumers. While the rate of tax here in dispute is only one-half mill per kilowatt hour, if the tax is sustained there is no limit to the taxing power of the State, and, in fact, an increase in the tax has already been proposed. This is discrimination of the worst type and under the decisions discussed under Point One the statute must be held to be arbitrary in its classification of the subjects of taxation.

POINT THREE

The Taxing Statute in question as applied to appellant Lexington Water Power Company imposes a tax upon an agency of the Federal Government in violation of the Constitution of the United States.

All of the electricity generated by the appellant Lexington Water Power Company is generated at a water power plant owned by it located on the Saluda River in Lexington County, South Carolina. This plant was constructed and is operated pursuant to a license duly granted by the Federal Power Commission pursuant to the provisions of the Federal Water Power Act (Finding of Fact No. 12; R. 81). A copy of the license granted to the appellant was attached as an exhibit to the bill of complaint (R. 18).

It is the contention of the appellant that the tax in question, as applied to it, is an "excise license or privilege tax" (see Sec. 1 [a] of Statute; R. 14) on an agency of the Federal Government.

Since the case of *McCulloch* v. *Maryland,* 4 Wheat. 316, it has been unquestioned law that a state is without power to tax the exercise of a privilege granted by the Federal Government.

The Federal Water Power Act (U. S. Code Annotated, Title 16, Sec. 791, *et seq.*) provides in Section 4 for the issuance of licenses for the purpose of constructing, operating and maintaining dams and power houses, among other things, necessary or convenient for the development and improvement of navigation in any of the navigable waters of the United States. Section 14 of the Act gives the United States the right upon or after the expiration of

any license (50 years) to take over and thereafter to maintain and operate any project constructed under license, upon paying to the licensee the net investment of the licensee in the project or projects so taken, not to exceed the fair value of the property taken, etc. Net investment is defined in Section 3 of the Act to mean the actual legitimate original cost plus the cost of additions and betterments, minus certain items which include amortization reserves. Under Section 10 of the Act, all licenses are required to contain a condition that after the first twenty years of operation out of surplus earned thereafter accumulated in excess of a specified rate of return, the licensee shall establish and maintain amortization reserves, which are to be held until the termination of the license or be applied from time to time in reduction of the net investment.

Pursuant to these provisions of the statute the license of this appellant in Article XXII contains the provision required by law as to amortization reserves and specifies the rate of return as required by the Act (R. 29-30).

It, therefore, becomes apparent that the tax in question as applied to this appellant, not only is a tax on the privilege of operating under a license granted by the Federal Government, but payment thereof will increase the amount which the Federal Government must pay on taking over the project at the expiration of the license, as such taxes operate to reduce the earnings of the project. At the present rate of tax this increases by $150,000 per year (R. 4), for a period of thirty years the amount which the Federal Government would have to pay at the expiration of this license for the project.

If a state is not permitted to tax the operations of a national bank (*Owensboro National Bank* v. *Owensboro*,

173 U. S. 664), or the gross receipts of a company mining Indian coal under the lease from the Federal Government (*Choctaw & Gulf R. R.* v. *Harrison*, 235 U. S. 292), or the income of a lessee operating under a lease of Indian lands from the Federal Government (*Gillespee* v. *Oklahoma*, 257 U. S. 501), it would seem to be clear that a state has no power to tax the privilege of operating under a license from the Federal Power Commission. (See also *Barnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393.) Some of the decisions which have denied the rights of the states in this respect, have operated merely to enrich the person held to be immune from taxation, but in the case at bar the effect of sustaining the immunity from taxation is to reduce the amount which must be paid by the Federal Government on taking over the project. If the doctrine that a Federal agency cannot be taxed on its operations is to be sustained on the theory that it imposes a burden on the Federal Government, acting through an agency selected by it, it certainly must be applied to the case at bar where the direct burden of the tax must eventually fall on the Federal Government.

The court below, in denying this contention, relied upon the case of *Susquehanna Power Company* v. *Tax Commission*, 283 U. S. 291, in which this court held that a licensee under the Federal Water Power Act was not immune from taxation on the land lying under the pool created by the licensee's dam. This court held that such a licensee was not immune from taxation on its property. The court said that

> "the challenge tax is imposed, not on the license, but on the private property of the licensee used in its business."

The court pointed out that in *McCulloch* v. *Maryland,* 4 Wheat. 316, the distinction had been made between a franchise or privilege granted by the Government to a private corporation in order to effect some governmental purpose, and the property employed by the grantee in the exercise of the privilege. It was accordingly held that the property (land) of the licensee was subject to taxation by the state.

The court below took the position that the tax here imposed was a tax on the property of the appellant within the case above cited on the theory that an excise tax on production or sales is in effect a tax on the property produced or sold, citing *Kehrer* v. *Stewart,* 197 U. S. 60 and *Welton* v. *Missouri,* 91 U. S. 275.

The case of *Welton* v. *Missouri, supra,* dealt with a statute requiring a license to deal in the sale of merchandise not produced within the state. This court held that in effect this imposed a tax upon the goods themselves and, accordingly, that the statute imposed a burden upon interstate commerce. In the case of *Kehrer* v. *Stewart, supra,* the same rule that a tax upon the seller of goods was a tax upon the goods themselves was laid down. Neither of these cases has any application to the case at bar. The only thing that could be said to be taxed is electricity, and this electricity is produced (generated) under the license from the Federal Power Commission. The tax could not be a property tax because the Constitution of the State of South Carolina (Article X, Section 1) requires that all property shall be assessed at a uniform rate and property taxes are required to be *ad valorem* (Article III, Section 29). If any such principle were to be sanctioned by this court, the rule that an agency of the Federal Government cannot be taxed on its privileges would be rendered nugatory.

This appellant is paying without question all taxes on its property, but it contends that the state has no power to go beyond this and tax the earnings which accrue to it by virtue of its license under the Federal Water Power Act.

POINT FOUR

The remedy at law being inadequate, a court of equity should restrain the enforcement of the Taxing Statute in question.

Section 3 of the statute in question requires persons subject to the tax to make a monthly return and to pay the amount of the tax for electricity generated in the previous month at the time of making the return. Failure to make a return subjects the offender to a penalty of 25% and failure to pay the tax results in an additional penalty of 25% (R. 16). Section 4 of the Act provides that the tax may be paid under protest and that the person so paying the tax may at any time within thirty days after making such payment, "but not afterwards," bring an action for recovery of the tax, and if successful, may recover the tax with interest at 4%.

Requiring as it does the institution of suits each month to recover back taxes paid under protest, with a statute of limitations of thirty days, it is clear that equity has jurisdiction to restrain the enforcement of the statute because the pursuit of the legal remedy would result in a multiplicity of actions.

Oelrichs v. *Spain,* 15 Wall. 211;
U. S. v. *Osage County,* 251 U. S. 128;
Cummings v. *National Bank,* 101 U. S. 153.

It is also clear that the remedy at law is not adequate because the taxpayer is permitted to recover interest at the rate of only 4%. The fact that interest was not recoverable in an action at law was mentioned as one ground for equity jurisdiction to restrain an alleged illegal tax in *Hopkins* v. *S. California Telephone Company,* 275 U. S. 393, and a state certainly cannot avoid the effect of this rule by allowing inadequate interest.

VI

CONCLUSION

The judgments of the court below should be reversed.

C. Edward Paxson,
George M. Le Pine,
W. C. McLain,
Counsel for Appellants.

THE TAXING STATUTE

An Act to Raise Revenue for the Support of the State Government by the Imposition of an Excise Tax Upon Electric Power Generated and Sold Within this State.

SECTION 1.—Be it enacted by the General Assembly of the State of South Carolina: (a) That in addition to all other taxes of every kind now imposed by law, every person, firm or corporation engaged in the business of manufacturing or generating hydro-electric power in the State of South Carolina shall be subject to the payment of an excise, license or privilege tax of five-tenths of one mill upon each kilowatt hour of hydro-electric power manufactured or generated, and said tax shall be paid to and collected by South Carolina Tax Commission.

(b) That in addition to all other taxes of every kind now imposed by law, every person, firm or corporation engaged in the business of manufacturing or generating electric power by the use of steam power in the State of South Carolina shall be subject to the payment of an excise, license, or privilege tax of five-tenths of one mill upon each kilowatt hour of electric power so manufactured or generated and said tax shall be paid to and collected by South Carolina Tax Commission.

(c) That in addition to all other taxes of every kind now imposed by law, every person, firm or corporation engaged in the business of selling electric power within the State of South Carolina shall be subject to the payment of an excise, license, or privilege tax of five-tenths of one mill upon each kilowatt hour of electric power sold in the State of South Carolina and said tax shall be paid to and

collected by South Carolina Tax Commission: Provided, That if such seller procures electric power which has been subject to the payment of the excise, license or privilege tax hereinbefore provided a credit on said tax to the amount of the excise tax already required to be paid by the person, firm or corporation generating the same within this State shall be allowed: Provided, Further, That the provisions of this Act shall not apply to the electric power manufactured or generated in another State and brought into this State until such power has lost its interstate character and immunities: Provided, Further, That the provisions of this Act shall not apply to any person, firm or corporation owning and operating an electric manufacturing or generating plant of ten horsepower or less, nor shall the provisions of this Act apply to industrial plants manufacturing or generating power for its own use, or for use upon its own premises by its bona fide operatives or employees but the tax shall be paid upon so much thereof as may be sold to other than its employees: Provided, Further, That the provisions of this Act shall not apply to municipalities manufacturing or generating electricity for the use of its customers.

Section 2.—Every person, firm or corporation engaged in the business of manufacturing, generating or selling electric power in this State shall provide themselves with and keep the necessary instruments to show the amount of electric power manufactured, generated or sold, expressed in kilowatt hours, and shall keep permanent, legible records showing the amount of power, expressed in kilowatt hours, manufactured, generated or sold each day. Such records and instruments shall be subject to examination by the Tax Commission or its duly authorized representatives at any time during business hours.

The South Carolina Tax Commission shall administer and enforce the tax imposed by this Act. It shall have the power to enter upon the premises of any tax payer and to examine, or cause to be examined, any of the instruments, books, records, etc., and to secure any other information directly or indirectly concerned in the enforcement of this Act. Also, make rules and regulations pertinent to the enforcement of this Act, which shall have the full force and effect of law.

Any person, firm or corporation required to keep either the necessary instruments or records prescribed in this Section shall be subject to a penalty of One Hundred ($100.00) Dollars per day for each day's omission to keep either the required instruments or required records. Such penalties to be collected in the same manner as herein provided for the collection of delinquent taxes: Provided, upon reasonable cause shown, the South Carolina Tax Commission may remit or refund the said penalties in whole or in part.

Section 3.—Every person, firm or corporation subject to the provisions of this Act shall between the first and tenth of each month, make a true and correct return to the South Carolina Tax Commission in such form as it may prescribe, showing the exact amount of electric power manufactured, generated or sold, expressed in kilowatt hours, during the previous month and remit the tax therewith.

In case of failure to make a true and correct return, the Tax Commission shall make the same upon such information as it may be able to obtain, assess the tax due thereon, and add a penalty of twenty-five per cent., and in case of failure to pay the tax, the South Carolina Tax Commission

shall add a penalty of twenty-five per cent., whereupon the South Carolina Tax Commission shall mail notice of the amount of taxes and penalty to the party failing to make such return or pay the tax, and if the tax and penalty is not paid within ten (10) days after mailing such notice, execution shall be issued in the manner and with the force provided hereafter in this Section. If any taxes or penalties imposed by this Act remain due and unpaid for a period of ten (10) days, the Tax Commission shall issue a warrant of execution directed to the Sheriff of any County of the State, commanding him to levy upon and sell the real and personal property of the taxpayer found within his County, for the payment of the amount thereof with penalties and the costs of executing the warrant, and to return such warrant to the Tax Commission and to pay it the money collected by virtue thereof.

The Sheriff to whom such execution is directed shall proceed to enforce same in the same manner provided by law for the enforcement of an execution issued by a County Treasurer against a delinquent tax payer. That the taxes and all penalties herein provided for, shall be held as a debt payable to the State by the party against whom the same shall be charged, and all such taxes, penalties and assessments shall be first lien in all cases whatsoever upon all property of the party charged therewith.

SECTION 4.—That if any clause, sentence, paragraph or part of this Act shall, for any reason, be adjudged by any Court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder of this Act, but shall be confined in its operation to the clause, sentence, paragraph or part thereof directly involved in the controversy in which such judgment shall

have been rendered. No caption of any Section or set of Sections shall in any way affect the interpretation of this Act or any part thereof: Provided, That the collection of the taxes or penalties imposed under the provisions of this Act shall not be stayed or prevented by any injunction, writ or order issued by any Court or Judge thereon. In all cases in which any taxes or penalties are required to be paid hereunder by any person, firm or corporation and the Tax Commission shall claim the payment of the taxes or penalties so assessed, or shall take any step or proceedings to collect the same, the person, firm or corporation against whom such taxes or penalties are charged, or against whom such step or proceedings shall be taken, shall, if he conceives the same to be unjust or illegal for any reason, pay the said taxes or penalties notwithstanding, under written protest, in such funds and monies as the South Carolina Tax Commission shall be authorized to receive, and upon such payment being made South Carolina Tax Commission shall make proper note that the same was paid under written protest and notify the State Treasurer that such taxes or penalties were paid under protest; that the person, firm or corporation so paying said taxes or penalties may at any time within thirty (30) days after making such payment, but not afterwards, bring an action against the South Carolina Tax Commission for the recovery thereof in any Court of competent jurisdiction and/or in proper cases in the Federal Courts and if it be determined in said action that such taxes or penalties were wrongfully and illegally collected for any reason going to the merits, then the Court before which the case is tried shall certify of record that the same were wrongfully collected and ordered to be returned with interest thereon at the rate of four (4%) per centum per annum.

Whereupon the Tax Commission shall issue its warrant upon the State Treasurer for refunding the taxes and penalties so paid, which shall be paid in preference to other claims against the treasury.

SECTION 5.—That the South Carolina Tax Commission may, in its discretion, compromise any action arising under the provisions of this Act, either before or after prosecution commenced. The South Carolina Tax Commission may, upon good cause shown, remit any penalties accruing under this Act, in whole or in part.

SECTION 6.—For the year 1931 the revenue produced under this Act shall reduce the 1931 property levy for State purposes to the full amount raised under the terms of this Act: Provided, further, That for the year 1932 and thereafter, the revenue derived under the provisions of this Act shall be turned into the State Treasury for the support of the State Government.

SECTION 7.—Any foreign corporation required to pay a tax hereunder for the year 1931, which shall not, for any cause whatsoever, have paid such license fee or tax, in addition to the payment of all license fees and taxes now or hereafter required by law, shall as an additional license fee or tax, for the year 1932, pay an amount equal to the license fee or tax provided for in this Act for the year 1931, and the payment of such additional license fee or tax for the year 1932 shall be a condition and part of the terms upon which they are allowed to enter this State and do business herein for the year 1932.

SECTION 8.—The tax provided in this Act shall be calculated and paid on all electric power manufactured, generated or sold, on and after the first day of May, 1931.

SECTION 9.—That this Act shall take effect immediately upon its approval by the Governor.

Approved the ninth day of May, 1931.

FILE COPY

Supreme Court of the United States

OCTOBER TERM, 1932

No. 390

BROAD RIVER POWER COMPANY, APPELLANT,

versus

WALTER G. QUERY, J. P. DERHAM, AND FRANK C. ROBINSON, AS MEMBERS OF AND CONSTITUTING THE SOUTH CAROLINA TAX COMMISSION, APPELLEES.

BRIEF OF APPELLEES

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Attorney General for South Carolina.
J. FRASER LYON,
Columbia, S. C.,
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THE R. L. BRYAN CO., COLUMBIA, S. C.
1-9-33-60

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BRIEF OF APPELLEES

I

OPINION OF COURT BELOW

The opinion below upon which an interlocutory injunction was denied (*South Carolina Power Company v. South Carolina Tax Commission*) is reported in 52 F. (2d.), 515. The opinion upon which a permanent injunction was denied and the bill dismissed will be found in the Record, page 53. These opinions were rendered in three cases against South Carolina Tax Commission. South Carolina Power Company has not appealed to this Court. The cases of Broad River Power Company and Lexington Water Power Company are now on appeal to this Court and are being argued together.

THE QUESTIONS INVOLVED

The question involved in these cases is the constitutionality of a statute of South Carolina which levies a tax of one-half mill per kilowatt hour on electricity generated and sold within the State.

II

STATEMENT OF THE CASE

This appellant is incorporated under the laws of South Carolina and its only business is done within the State. It is engaged in the generation of electric energy by the use of both water and steam power (R-3).

The assignments of error in this case are in substance and effect the same as the assignments in the *Lexington Water Power Company case,* except there is no assignment of error in this case as to gas companies not being taxed, nor as to the taxation of a federal agency, and Article I, Section 8 of the Constitution of South Carolina.

III

SPECIFICATION OF ERRORS

As to the specification of errors, appellees contend that there was no denial of the equal protection of the laws:

(1) In exempting from taxation the production of electricity by the use of oil or internal combustion engines;

(2) In exempting from the tax industrial plants generating power for its own use, or for use upon its own premises by its *bona fide* operatives or employees; and,

(3) In exempting from the tax sellers of electricity on which a generation tax had theretofore been paid.

IV

ARGUMENT

The appellees in support of their contentions herein, respectfully refer to the brief filed in case No. 391, which is argued herewith.

V

CONCLUSION

The judgment of the Court below should be affirmed.

Respectfully submitted,

JOHN M. DANIEL,
Attorney General for South Carolina.

J. FRASER LYON,
Solicitors for Appellees.

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APPELLEES' ARGUMENT

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This is an appeal from the United States District Court for the Eastern District of South Carolina, three Judges sitting, convened pursuant to Section 266 of the Judicial Code. The appellant, complainant in the Court below, sought an interlocutory injunction to enjoin the individual members of the South Carolina Tax Commission from collecting a tax of five-tenths of one mill upon each kilowatt hour of electric power generated within the State.

From the order denying an interlocutory injunction an appeal was taken to this Court. The order was affirmed. 286 U. S., 525, 52 Supreme Court Reporter, 494.

The case is now on appeal from a final order of the three-Judge Court denying a permanent injunction.

STATEMENT

Lexington Water Power Company, a South Carolina corporation, generates all of its electric energy by water power within the State (R., 1, 4 and 6). Its dam and power plant were constructed under permission granted by the Federal Power Commission. It sells all of its electric energy, wholesale, to corporations having transmission and distribution lines in South Carolina and extending into North Carolina (R., page 8). It is required under the Act to pay the tax on the number of kilowatt hours generated, but not upon the sale of that which is generated.

Generally speaking, the Tax Act in question imposes (a) a tax of five-tenths of one mill upon each kilowatt hour of hydro-electric power generated within the State, (b) a tax of five-tenths of one mill upon each killowatt hour of electric power generated by steam within the State, and (c) a tax of five-tenths of one mill upon the sale within the State on each kilowatt hour of electric power: Provided, that if such seller procures electric power which has been subject to the payment of the excise, license or privilege tax hereinbefore provided, a credit on said tax to the amount of the excise tax already required to be paid by the person, firm or corporation generating the same within this State, shall be allowed.

Electric generating plants of ten horsepower or less, industrial plants generating power for their own use, or use upon their own premises by their *bona fide* operatives or employees, and plants of municipalities generating electricity for use of their own customers, are exempt from the payment of the tax.

Section 4 provides that if any part of the Act shall be adjudged to be invalid, such judgment shall not invalidate the remainder of the Act.

Discrimination

Assignment of error one (1) is to the effect that it is an unlawful discrimination not to have taxed gas companies and because the tax is not imposed upon the production of electricity by the use of oil and combustion engines.

The record shows that only two very small plants in the State are engaged in producing electricity by the use of oil or internal combustion engines (R., page 69 (9)). We contend, however, that it makes no difference whether there be little or much competition between electric power generated by appellant by the use of water power on the one hand, and that generated by use of internal combustion engines and gas on the other.

The State of Pennsylvaina taxed anthracite coal, but did not tax bituminous coal. This Court said in regard thereto:

> "But we need not dwell further on these considerations. The fact of competition may be accepted. Both coals being compositions of carbon, are, of course, capable of combustion and may be used as fuels, but under different conditions and manifestations, and the difference determines a choice between them even as fuels."
>
> *Heisler v. Thos. Colliery Co.*, 260 U. S., 245, 43 Sup. Ct. Rep., 83.

Nevertheless, under the provisions of Section 1 (c) of the Act, the tax is required to be paid on the sale of electricity which has not borne the tax on generation and this would include all electric power howsoever generated, provided the tax had not been paid on the generation.

We feel that this Court should not be further detained with argument upon the points made under this assignment, as the Court below has fully covered this matter. We, therefore, content ourselves by referring to the record, pages 50-51.

Assignment of error two (2) is to the effect that the Act unlawfully discriminates because it exempts from the tax industrial plants generating power for their own use or use of

their employees, and municipalities generating power for use of their customers.

This discrimination is neither arbitrary, oppressive nor capricious, and in this case is a lawful one based upon a real difference between the parties taxed and those enjoying the exemption under the Act.

> "The Constitution of Louisiana classifies the refiners of sugar for the purpose of taxation into those who refine the products of their own plantations, and those who engage in a general refining business, and refine sugars purchased by themselves or put in their hands by others for that purpose, imposing a tax only upon the latter class. To entitle a party to the exemption it must appear (1) that he is a farmer or a planter; (2) that he grinds the cane as well as refines the sugar and molasses; (3) that he refines his own sugar and molasses, meaning thereby the product of his own plantation. Whether he may also refine the sugar of others may be open to question; although by its express terms the Act does not apply to planters who granulate syrup for other planters during the rolling season. The discrimination is obviously intended as an encouragement to agriculture, and does not deny to persons and corporations engaged in a general refining business the equal protection of the laws."
>
> *American Sugar Refining Co. v. Louisiana,* 179 U. S., 89, 21 Sup. Ct. Rep., 46.

> "The complainant alleges that the tax will prohibit and confiscate the plaintiff's business, which is that of manufacturing fish, oil, fertilizer, fish meal and by-products from herring either in whole or in part; that the tax unreasonably discriminates against the plaintiff, as it levies no tax upon the producers of fish oil, etc., from other fish, and is otherwise extortionate; and that it contravenes the Act of Congress in lack of uniformity and in exceeding one per centum of the actual value of the plaintiff's property. The prophecies of destruction and the allegations of discrimination as compared with similar

manufacturers from salmon are denied by the Attorney General of Alaska, the latter denial being based upon a comparison of the statutes which of course is open. We are content however to assume for the purposes of decision that, not to speak of other licenses, the questioned Acts do bear more heavily upon the use of herring for oil and fertilizer than they do upon the use of other fish. But there is nothing in the Constitution to hinder that."

Alaska Fish Salting & By-Products Co. v. Smith, 255 U. S., 44, 41 Sup. Ct. Rep., 220.

"It is established that a distinction in legislation is not arbitrary, if any state of facts reasonably can be conceived that would sustain it, and the existence of that state of facts at the time the law was enacted must be assumed."

Rast v. Van Deman & Lewis Co., 240 U. S., 342, 36 Sup. Ct. Rep., 370-374.

See also: *Pacific Express Co. v. Seibert et al.,* 142 U. S., 339, 12 Sup. Ct. Rep., 250.

Hart Refineries v. Harmon, 278 U. S., 499, 49 Sup. Ct. Rep., 188.

State Board Tax Commissioners of Indiana v. Jackson, 283 U. S., 527, 51 Sup. Ct. Rep., 540.

Alward v. Johnson, 282 U. S., 509, 51 Sup. Ct. Rep., 273.

Brown-Forman Co. v. Ky., 217 U. S., 563, 30 Sup. Ct. Rep., 578.

Bell's Gap R. R. Co. v. Penn., 134 U. S., 232, 10 Sup. Ct. Rep., 533.

Metropolis Theatre Co. v. Chicago, 228 U. S., 61, 33 Sup. Ct. Rep., 441.

Toyota v. Hawaii, 226 U. S., 184, 33 Sup. Ct. Rep., 47.

Wampler v. Lecompte, 282 U. S., 172, 51 Sup. Ct. Rep., 92.

Middleton v. Texas Power & Light Co., 249 U. S., 152, 39 Sup. Ct. Rep., 227.

It was entirely proper for the Legislature to exempt municipalities from this tax, as municipalities are agencies of the State, and their operations are conducted not for private gain, but for the benefit of the public.

Irvine v. Town of Greenwood, 89 S. C., 511, 72 S. E., 228.

Ordinarily municipal property and business conducted by it are not taxed.

State Const., 1895, Art. X, Sec. 4.

Hardwick v. Wolcott, 98 Vt., 343, 129 Atlantic, 159, 39 A. L. R., 1222.

Assignment of error three (3) is to the effect that the Act of the Legislature is invalid because it exempts from the sales tax electric current upon which the generation tax has already been paid.

This provision of the statute was intended to prevent doubly taxing the same electric energy. It was designed to relieve a purchaser of electric power who resells and distributes it to its customers from the payment of another tax upon the electricity on which the generation tax had been paid.

The Act simply recognizes the custom of trade that the generator paying the generation tax passes it on to the first purchaser, and if the first purchaser resells he passes the tax on to the consumer, and so it is that the consumer pays the tax indirectly in case of the generation tax, as well as in case of the sales tax, but is not required to indirectly pay more than the one tax.

> "The tax, to describe it according to its essential nature, is an excise upon domestic sale or storage, designed to affect the use of the products, a tax imposed at the time of inspection, the inspector acting also as tax gatherer, inspection and tax payment required but once, and that, ordinarily, from the dealer at the time of the first domestic sale, or during storage preliminary to such sale. The self-interest of the dealer and the customs of trade are relied upon to add the tax to the price of the product, and

thus pass it on to the ultimate consumer—a method appropriate in indirect taxation, and certainly a not unreasonable mode of distributing the burden among those who share in the benefits."

Texas Co. v. Brown, 258 U. S., 466, 42 Sup. Ct. Rep., 379.

Viewing the tax according to its essential nature, it is at the rate of five-tenths of one mill per kilowatt hour on all electric power generated in the State, and five-tenths of one mill on all power sold intrastate which has not borne the generation tax. The tax payment is required but once, and that from the domestic generator at the time of generation, and at the time of sale within the State on that which has not borne the tax on generation.

We may say in this connection, that South Carolina imposes a tax upon the business of selling cigarettes, cigars, other manufactured tobacco products, and bottled soft drinks; that revenue stamps are required to be placed on each individual article sold and that when once the revenue stamps are affixed, such articles may be resold any number of times and no additional tax is required.

And so it is on the sale of gasoline, the tax is required only on the first sale. It is thereby recognized that the final consumer indirectly pays the tax and that indrectly he should pay only the one tax and not have heaped upon him a multiplicity of taxes.

The tax is not imposed upon an agency of the Federal Government:

Assignments Nos. four (4) and eight (8) are to the effect that this is a tax on an agency of the Federal Government.

Appellant is chartered and doing business under the laws of South Carolina. It holds a permit from the Federal Power Commission to construct and operate its plant on one of the rivers of the State. By reason of the permit from the Federal Power Commission, it claims that it is an agency of the Federal Government in aid of navigation, etc. (R. p. 5), and,

therefore, beyond the taxing power of the State. Appellant in the production and sale of electric power is not acting as an agent of the Federal Government, but is engaged in private business for profit.

As was said by the Court below:

> "Complainants, in the production and sale of power, are not acting as agents of the government, but are engaged in private business for profit" (R., page 65).
>
> "The Act of Congress of course conveyed no title, and did not attempt to found one by delegating the power to take by eminent domain. *Western U. Teleg. Co. v. Pennsylvania R. Co.*, 195 U. S., 540, 574, 49 L. Ed., 312, 324, 25 Sup. Ct. Rep., 133, 1 Ann. Cas., 517. It made the erection of telegraph lines free to all submitting to its conditions, as against an attempt by a State to exclude them because they were foreign corporations, or because of its wish to erect a monopoly of its own. *Pensacola Teleg. Co. v. Western U. Teleg. Co.*, 96 U. S., 1, 24 L. Ed., 708. It has been held to prevent a State from stopping the operation of lines within the Act by injunction for failure to pay taxes. *Western U. Teleg. Co. v. Atty. Gen.*, 125 U. S., 530, 31 L. Ed., 790, 8 Sup. Ct. Rep., 961. But except in this negative sense, the statute is only permissive, not a source of positive rights."
>
> "These cases taken together, establish the proposition that the privilege given under the terms of the Act to use the military and post roads of the United States for the poles and wires of the company is to be regarded as permissive in character, and not as creating corporate rights and privileges to carry on the business of telegraphy, which were derived from the laws of the State incorporating the company, and that this permissive grant did not prevent the State from taxing the real or personal property belonging to the company within its borders, or from imposing a license tax upon the right to do a local business within the State."

Williams v. Talladega, 226 U. S., 404, 33 Sup. Ct. Rep., 118.

"But, furthermore, it seems to us extravagant to say that an independent private corporation for gain, created by a State, is exempt from State taxation, either in its corporate person or its property, because it is employed by the United States, even if the work for which it is employed is important and takes much of its time. *Thomson v. Union P. R. Co.,* 9 Wall., 579, 19 L. Ed., 792; *Union P. R. Co. v. Peniston,* 18 Wall., 5, 21 L. Ed., 787."

Baltimore Shipbuilding & D. D. Co. v. Mayor et al., 195 U. S., 375, 25 Sup. Ct. Rep., 52.

"The mere fact that property is used among others, by the United States as an instrument for effecting its purpose does not relieve it from State taxation. The most that can be said here is that among the public served by this railroad are some mines on land leased from the Choctaw Nation. The right-of-way and station ground in question, instead of being, as was perhaps originally contemplated by the Act of February 18, 1888, part of a branch to leased 'coal veins,' have become an integral part of through lines of a great railroad system. Holdenville is on the main line of the Choctaw, Oklahoma & Gulf, which extends from the west bank of the Mississippi River, through Arkansas and Oklahoma, to the Texas State line, a distance of nearly 650 miles. By the lease to the Rock Island, this railroad has become a part of the through lines of a much larger system. And even though it be granted that the Federal Government utilized the railroad as an instrument in working out its policy toward the Indians, the tax upon the railroad property would be none the less valid."

Choctaw, etc., v. Mackey, 256 U. S., 531, 41 Sup. Ct. Rep., 583.

In a very recent decision of the Court in a case where a power company had built a dam under a Federal license it was held that property owned and used by a private corporation for

private business advantage in exercise of a privilege, or franchise granted by the government, is subject to State taxation.

> "With that end in view, the distinction has long been taken between a privilege or franchise granted by the government to a private corporation in order to effect some governmental purpose, and the property employed by the grantee in the exercise of the privilege, but for private business advantage. The distinction was pointed out by Chief Justice Marshall in *McCullouch v. Maryland,* 4 Wheat., 316, 436, 4 L. Ed., 579, and in *Osborn v. Bank,* 9 Wheat., 738, 867, 6 L. Ed., 204; see *Union Pac. Railroad Co. v. Peniston,* 18 Wall., 5, 34-37, 21 L. Ed., 787. It has been followed without departure, and property so owned and used has uniformly been held to be subject to State taxation. . . .
>
> "The present case is not only controlled by the earlier decisions of this Court, but it would be difficult to suppose any case in which the adverse effect of a tax upon a governmental purpose would be more remote or attenuated, or in which the asserted immunity would more seriously impair the sovereign power of the State to tax, than in this one."
>
> *Susquehanna Power Co. v. State Tax Com. of Md.,* 283 U. S., 291, 51 Sup. Ct. Rep., 435.

See also,

> *Henderson Bridge Co. v. Kentucky,* 166 U. S., 150, 17 Sup. Ct. Rep., 532.

It is very certain that the construction of appellant's dam across Saluda River does not aid navigation, nor does it facilitate interstate and foreign commerce.

> "Saluda dam of Lexington Water Power Company as now constructed prevents the passage of any watercraft from a point below the dam to a point above the dam, and *vice versa* (R. pp. 73, 81).

So, whatever navigation that may have heretofore existed at the point of the erection of the dam is now completely destroyed.

The Act does not impair the obligation of a contract:

Assignment of error No. five (5) is to the effect that the Act in question violates Article I, Section 8, of the Constitution of South Carolina.

What particular part is violated is left to conjecture, but it is assumed that it relates to the inhibition against laws impairing the obligation of contracts.

The only contract the appellant in this case has with South Carolina is its charter, and it has not been made to appear that this charter grants any immunity from taxation.

By Statute of South Carolina the right is reserved to amend, alter or repeal any charter.

Code of Laws S. C., 1932, Vol. 3, Sec. 7676.
Tomlinson v. Jessup, 82 U. S., 454, 21 L. Ed., 204.
See also Constitution 1895, Art. 9, Sec. 2.

We refer this Court to what was said by the Court below on this subject (R., 67).

Conclusion

It is manifest by the general scope of the Act in question that the Legislature intended to raise revenue for the support of the State government by taxing the generation and use of electricity within the State. There is no longer a question of the power of the State to tax all electric energy which is generated within the State. *Utah Power & Light Company v. Pfost,* 286 U. S., 165, 52 Supreme Court Reporter, 548-553. However, the Legislature was confronted with the fact that much electric energy generated in Georgia and North Carolina is brought into South Carolina and here used. This State not having power to tax the generation of electric energy in other states and which energy is transmitted into South Carolina, went as far as it could in taxing that energy, to-wit, upon the sale thereof in South Carolina when it had lost its immunity from taxation as interstate commerce.

"The difference, however, is only such as arises naturally from the extent of the jurisdiction of the State in the

two classes of cases, and cannot be regarded as an unfriendly or unreasonable discrimination."

Shaffer v. Carter, 252 U. S., 37, 40 Sup. Ct. Rep., 227.

If such energy should be brought into the State and sold to individual consumers free of tax, it would be to the manifest disadvantage of electric energy generated in this State, therefore, the Legislature went as far as it could towards taxing the electric energy brought in from other states. And so it appears that the purpose of the Legislature was to tax the generation and the use of all electric energy in South Carolina.

It is true that the record shows that there are two generating plants within the State which use internal combustion engines, but these are shown to be of insignificant size. Perhaps this Court would take judicial notice that it is impossible to generate the vast quantities of electric energy consumed, by the use of internal combustion engines in competition with the vast hydro-electric developments and steam plants within the State. As the Court below said, it is no doubt true that the Legislature did not have its attention called to the two little plants operated by internal combustion engines (R. p. 50). However, under the provisions of the Act, this electricity of infinitesimal quantity is taxed upon its sale, just as power coming in from Georgia and other states is taxed upon its sale when it becomes local or intrastate business.

"In determining whether there is a denial of equal protection of the laws by such taxation, we must look to the fairness and reasonableness of its purposes and practical operation, rather than to minute differences between its application in practice and the application of the taxing statute or statutes to which it is complementary."

Gregg Dyeing Co. v. Query, 286 U. S., 472, 52 Sup. Ct. Rep., 631.

But with this general scheme of taxing all electric energy generated and used within the State, the Legislature has granted exemption to industrial plants which are principally textile manufacturing companies generating electric energy for their

own use (R. 390 p. 23) and for use of their *bona fide* employees, and municipalities generating electric energy for those who reside within the municipality.

We feel that under the decision of *Alaska Fish Salting & By-Products Co. v. Smith,* 255 U. S., 44, 41 Sup. Ct. Rep., 220, that the State is permitted to so arrange its taxation as to favor in this way the great and essential industries within this State, such as textile manufacturing companies. We think that this discrimination is based upon sound principles and for lawful reasons. It is, perhaps, generally and commonly known that the textile industry and other manufacturers have for some years been under a very great depression and sustaining heavy losses, except in very rare and remarkable cases; that these industrial plants afford the means of livelihood to many thousands of the people of South Carolina who otherwise would be without employment. They are engaged in purely private business and have no power of condemnation.

It is also generally known that the large corporations generating electric energy for sale are now, and for years past have been, making large profits. It is a very exceptional case where a power company has not made substantial profits and enjoyed prosperity when all others were suffering adversity, and the number employed in such activities is very small when compared with those engaged in the textile manufacturing business.

They are also public utilities and are granted power to condemn lands for right-of-way, for transmission lines, pondage area, etc.

Code of Laws S. C., 1932, Vol. 3, Secs. 8531-8540.
Lexington Water Power Co. v. Wingard, 148 S. E., 366.

The charter of Parr Shoals Power Company, now Broad River Power Company, grants power to condemn lands for pondage, etc.

Acts S. C., 1908, page 574.
Acts S. C., 1925, page 842.

As to exempting municipalities from the tax, we say that it is the public policy of the State not to place any tax on a municipality in South Carolina. The Constitution of the State forbids the taxation of municipal property used for public purposes. Constitution of S. C., Article X, Section 4. So far as we know and believe, there has been only one deviation in this State from the policy not to place a tax upon a municipality, and this instance was where the Legislature compelled cities and counties to pay a tax on the storage of gasoline. *City of Greenville v. Query,* 286 U. S., 472, 52 Sup. Ct. Rep., 631. And if we are correctly informed, it is the policy of all other states not to tax its municipalities. We, therefore, say that there is this fundamental reason for not imposing this tax upon municipalities.

The failure to apply this tax to gas companies, we think, is fully justified under the decision of this Court in the case of *Heisler v. Thos. Colliery Co.,* 260 U. S., 245, 43 Sup. Ct. Rep., 83.

The question presents itself under appellant's theory as to this; is it necessary to tax kerosene oil to make the tax valid on electric energy, because like electric energy kerosene is used for light, heat and power? We think not.

But if the exemptions complained of be contrary to any constitutional provisions and, therefore, unlawful, they should be construed as if they were not contained in the Act and the rest of the Act allowed to stand. For the Act provides, Section 4:

> "That if any clause, sentence, paragraph or part of this Act shall, for any reason, be adjudged by any Court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder of this Act, but shall be confined in its operation to the clause, sentence, paragraph or part thereof directly involved in the controversy in which such judgment shall have been rendered."

In discussing a similar provision in an Act of the State of Idaho, this Court said:

"It fairly may be assumed that the Idaho Legislature, in making this declaration, had in mind every provision of the Act, including Section 5. The primary object of the statute under review, plainly, is to raise revenue. The exemption made by Section 5 and the provisions for carrying that exemption into effect are secondary. We find no warrant for concluding that the Legislature would have been content to sacrifice an important revenue statute in the event that relief from its burdens in respect of particular individuals should become ineffective. On the contrary, it seems entirely reasonable to suppose that, if the Legislature had expressed itself specifically in respect of the matter, it would have declared that the tax, being the vital aim of the Act, was to be preserved even though the specified exemptions should fall for lack of validity. *Field v. Clark,* 143 U .S., 649, 696, 697, 12 S. Ct., 495, 36 L. Ed., 294; *People ex rel. Alpha P. C. Co. v. Knapp,* 230 N. Y., 48, 60-63, 129 N. E., 202."

Utah Power & Light Co. v. Pfost, 286 U. S., 165, 52 Supt. Ct. Rep., 548-553.

Respectfully submitted,

JOHN M. DANIEL,
Attorney General for South Carolina,
J. FRASER LYON,
Solicitors for Appellees.

SUPREME COURT OF THE UNITED STATES.

Nos. 390 and 391.—October Term, 1932.

Broad River Power Company, Appellant, 390 *vs.* Walter G. Query, J. P. Derham, and Frank C. Robinson, as members of and constituting the South Carolina Tax Commission.	Appeals from the District Court of the United States for the Eastern District of South Carolina.
Lexington Water Power Company, Appellant, 391 *vs.* Walter G. Query, J. P. Derham, and Frank C. Robinson, as members of and constituting the South Carolina Tax Commission.	

[February 6, 1933.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

These suits were brought to restrain the enforcement of a statute of South Carolina (Act of May 9, 1931, 37 St. at Large, 357) imposing a tax on the production and sale of electric power. The District Court of three judges (28 U. S. C. 380) sustained the tax and the cases come here on appeal from final decrees dismissing the bills of complaint for want of equity. 52 F. (2d) 515; 286 U. S. 525; 60 F. (2d) 528.

The contention, pressed below, that the statute is repugnant to the commerce clause of the Federal Constitution is not presented here. The grounds of attack are (1) that the statute is a denial of the equal protection of the laws, contrary to the Fourteenth Amendment; and (2), in the case of the Lexington Water Power Company, that the tax is imposed upon an agency of the United States.

(1). The complaint, upon the first ground, is that the tax is laid upon the production of electricity by water power or steam power, while the production of electricity by the use of oil or internal combustion engines is not taxed, and that the statute also exempts from the tax industrial plants generating power for their own use or that of their employees.

The court below adequately answered this contention. The court found that there were at least two plants in the State producing electric current by the use of internal combustion engines and that these plants were small and their business was comparatively insignificant. The court pointed out that the purpose of the legislature was evidently "to tax the generation of electric current by the hydroelectric companies which utilize the water power in the rivers of South Carolina, one of the great natural resources of that State". And the generation of current by the use of steam power was taxed "because it is a matter of common knowledge that the hydroelectric companies use steam power to supplement water power in the production of their current, and also because current produced by steam power is the great competing factor on the market with current produced by water power." 52 F. (2d) p. 519. This classification cannot be regarded as arbitrary. Nor can it be doubted that the State was entitled, in devising its fiscal system, to recognize the distinction between hydroelectric companies generating electric current for sale to the public and industrial plants which develop power for their own use and that of their employees. The principles involved have been so recently restated by this Court that elaboration is unnecessary. *Heisler* v. *Thomas Colliery Co.*, 260 U. S. 245; *Ohio Oil Company* v. *Conway*, 281 U. S. 146; *State Board of Tax Commissioners* v. *Jackson*, 283 U. S. 527.

(2). The separate complaint of the Lexington Water Power Company is that it is generating current at a water power plant, on the Saluda river, which was constructed and is operated pursuant to a license granted by the Federal Power Commission under the Federal Water Power Act (16 U. S. C., chap. 12) and hence that the tax is an "excise, license or privilege tax" upon a Federal agency.

It is apparent, however, that the complainant in generating and selling power is not acting as an agent for the Government. It acts with the Government's permission, and while it may be said

to have received a privilege from the Government, it is not a privilege to be exercised on behalf of the Government. The tax is not upon the exertion of, and cannot be said to burden, any governmental function. *Fox Film Corporation* v. *Doyal*, 286 U. S. 123, 130. The tax is not laid upon the license granted by the Federal Water Power Commission but upon the production and sale of power which the company generates at its own pleasure and exclusively for its own profit. Notwithstanding the special characteristics of electrical energy, the company is engaged in producing and selling an article of trade. *Utah Power & Light Company* v. *Pfost*, 286 U. S. 165, 180, 181. The product is property. The fact that a privilege has been received from the Federal Government does not exempt that property or the local business in producing and selling it from the burdens of taxation otherwise valid. *Railroad Company* v. *Peniston*, 18 Wall. 5, 33; *Choctaw, O. & G. R. R. Co.* v. *Mackey*, 256 U. S. 531, 537; *Willcutts* v. *Bunn*, 282 U. S. 216, 226; *Fox Film Corporation* v. *Doyal, supra; Susquehanna Power Co.* v. *Tax Commission (No. 1)*, 283 U. S. 291, 294. Thus, the "permissive grant" by the Federal Government to a telegraph company to use the military and post roads of the United States for its poles and wires "did not prevent the State from taxing the real or personal property belonging to the company within its borders or from imposing a license tax upon the right to do a local business within the State". *Williams* v. *Talladega*, 226 U. S. 404, 416; *Western Union Telegraph Co.* v. *Massachusetts*, 125 U. S. 530, 549; *Western Union Telegraph Co.* v. *Gottlieb*, 190 U. S. 412, 423. The complainant is in no better position with respect to the tax here in question.

Decrees affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.